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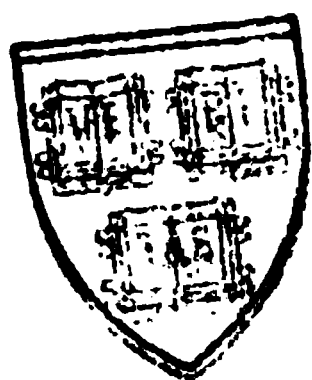
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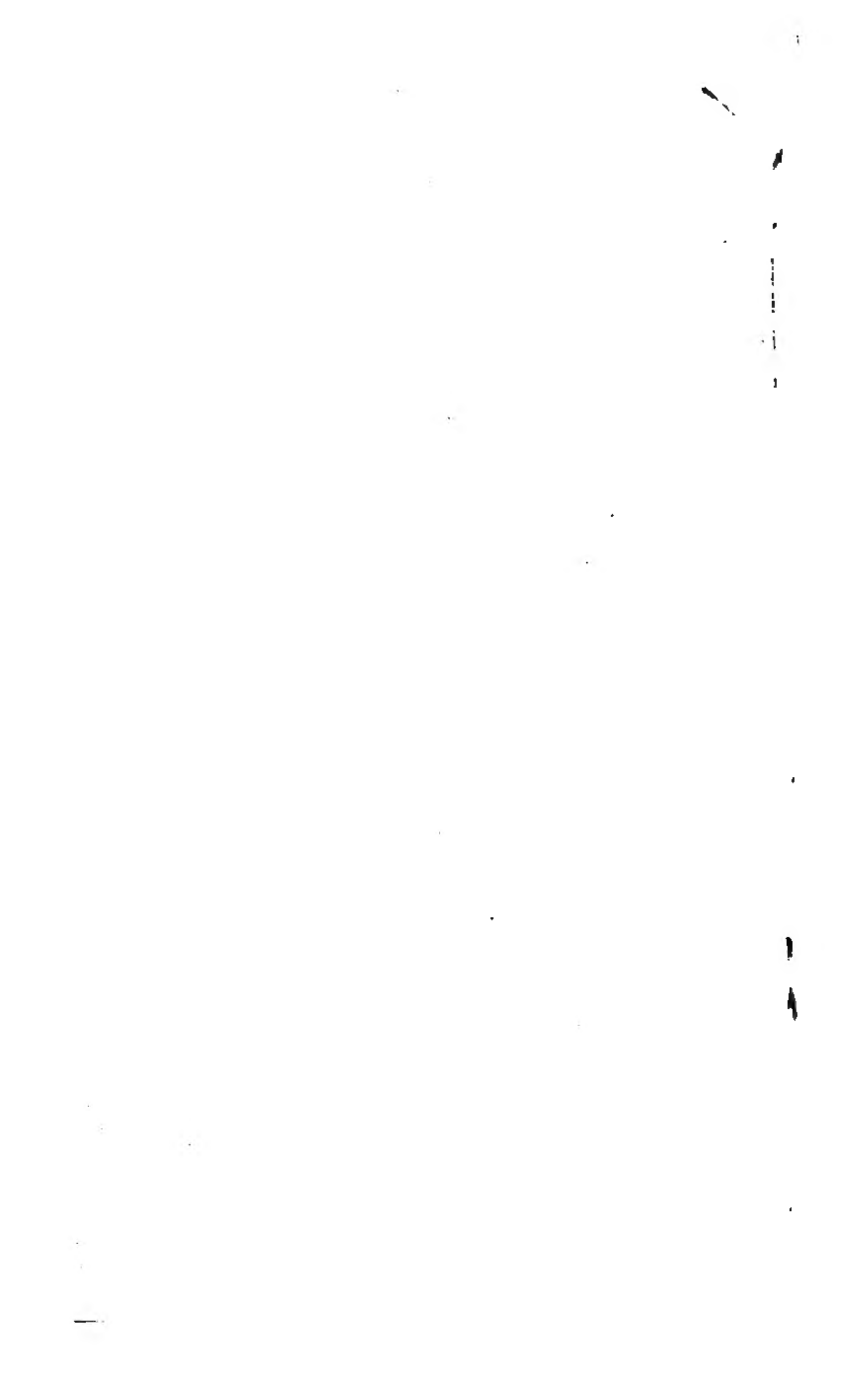
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VOL. 55—INDIANA REPORTS.

55	1	55	65	55	128	55	169	55	239	55	310	55	385	55	461	55	528
109	526	59	351	71	206	79	468	61	334	56	94	89	543	56	354	58	236
55	5	63	154	72	484	92	306	64	255	64	159	92	134	57	273	60	126
58	467	64	269	80	124	102	500	67	397	72	407	55	387	57	487	60	508
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80	72	68	482	107	429	69	276	84	363	77	20	91	504	92	599	110	48
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61	459	74	214	74	214	65	152	65	152	71	40	101	239	73	8	73	8
109	503	88	23	88	23	91	456	83	295	75	561	104	586	55	599	55	599
111	2	91	456	106	295	95	522	102	127	90	149	104	586	107	220	107	220
55	59	120	458	120	458	102	127	106	368	106	368						



11

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE ~

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

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By AUGUSTUS N. MARTIN,
OFFICIAL REPORTER.

VOL. LV.

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1876,
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TABLE OF THE CASES

REPORTED IN THIS VOLUME

Adamson et al., Hottell v.....	276	Chambers et al., Cravens, Assignee, v.....	5
Allen, Blair v.....	409	Chambers, Mitchell v.....	289
Backes v. Dant	181	Christian, Freck v.....	320
Ball et ux. v. Nash.....	9	Christie, Kimble v.....	140
Barnes et al., Jackson T'w'p v....	136	City of Aurora v. Colshire	484
Barr, Warren Co. Ag'l Joint Stock Co. et al. v.....	80	City of Delphi, Lowrey, Adm'r's, v.....	250
Bartel v. Tieman et al.....	438	City of Evansville, Shanklin v....	240
Baxter, Young v.....	188	City of Huntington v. Day.....	7
Bearss et al., The City of Peru et al. v.....	576	City of Indianapolis et al., Stilz et al. v.....	515
Bell, Doherty et al. v.....	205	City of Peru et al. v. Bearss et al..	576
Bingham v. The Board of Com'rs of Marion Co.....	113	Colshire, The City of Aurora, v....	484
Blain, Palmer v.....	11	Conner, Whitehall v.....	354
Blair v. Allen	409	Coombs v. Carr et al.....	308
Blakey, Assignee, Whitworth v....	510	Corwin, Adm'r, Jenkins et al. v....	21
Board, etc., of Clay Co. et al., Markle et al. v.....	185	Corwin, Adm'r, Stilwell, Adm'r's, et al. v.....	433
Board of Comm'rs of Lagrange Co. et al. v. Rogers et al.....	297	Couch, Adm'r, Sebrell et ux. v....	122
Board of Comm'rs of Lake Co., Holten v.....	194	Coyner v. Boyd et al.....	166
Board of Comm'rs of Marion Co., Bingham v.....	113	Crane et al., The Indianapolis, P. & C. R. W. Co. v.....	430
Bogan, Wilds et al. v.....	331	Cravens, Assignee, v. Chambers et al.....	5
Bowen v. Phillips, Adm'r, et al....	226	Cravens et al. v. Duncan.....	347
Boyd et al., Coyner v.....	166	Cravens et al., Duncan v.....	525
Braden, Pettit v.....	201	Crawford et al. v. Crockett et al..	220
Brandywine Junction Turnpike Co. et al., Webb v.....	441	Crockett et al., Crawford et al. v..	220
Brinkmeyer v. Browneller et al....	487	Cronkhite v. Johnson.....	175
Brookbank v. The State, ex rel. Murphy.....	169	Cronkhite et al., Adm'rs, Roe v....	183
Brown et al., Freed et al. v.....	310	Dant, Backes v.....	181
Brown et al., Meyers et al. v.....	596	Darnall et al. v. Hurt, Guardian..	275
Browneller et al., Brinkmeyer v....	487	Dawson v. Wilson et al.....	216
Burk et al. v. Hill.....	419	Day, City of Huntington v.....	7
Burrell, McOsker v.....	425	De Hart, Powell v.....	94
Butler et al. v. Holtzman et al....	125	De Haven, Watt. Guardian, v....	128
Carpenter, Emmons et al. v.....	329	Dill et al., Ogle et al. v.....	130
Carr et al., Coombs v.....	303	Dixon et al., Long et al. v.....	352
Carr et al., Rothrock et al. v.....	384	Doherty et al. v. Bell.....	205
Castor, Graham v.....	559	Dorrel, Ricketts v.....	470
		Downing et al., Eagan v.....	65
		Dubois, Stearns v.....	257
		Duncan, Cravens et al. v.....	347

Duncan v. Cravens et al.....	525	Ingoldsby, The Town of Brazil v.....	513
Eagan v. Downing et al.....	65	Jackson Township v. Barnes et al.....	136
Eby, The Pittsburgh, Cincinnati & St. Louis R. W. Co. v.....	567	Jarrell, Executor, Lucas v.....	41
Emmerson v. Marvel, by her next friend, Marvel.....	265	Jeffersonville, M. & I. R. R. Co. v. Lyon.....	477
Emmons et al. v. Carpenter.....	329	Jenkins et al. v. Corwin, Adm'r ..	21
Emmons et al. v. Meeker.....	321	Johnson, Cronkhite v.....	175
Ex Parte Jones et al.....	176	Johnson et al. v. Kohl	454
Ex Parte Simpson, Adm'r.....	415	Johnson v. Prine.....	351
Falkner v. The Ohio & Missis- sippi R. W. Co.....	369	Johnson, The Town of Brazil v.....	512
Feezer et al., Stephenson v.....	416	Johnson et al., The Town of Brazil v.....	511
Fislar et al., Woody v.....	592	Jones et al., Ex Parte	176
Ford et al., Hays v.....	52	Kennedy, Graham v.....	209
Freck v. Christian.....	320	Kern, Ex'r, et al. v. Maginniss et al.....	459
Freed et al. v. Brown et al.....	310	Kimble v. Christie.....	140
Fuhrer, Adm'r, v. The State, ex rel. Attorney General.....	150	Kohl, Johnson et al. v.....	454
Gabe v. McGinnis et al.....	372	Kress, The Town of Brazil v.....	14
Garber et al., Glass v.....	336	Kress et al., The Town of Brazil v.....	513
Genter, The Town of Brazil v.....	512	Krewson et al., Storey et al. v.....	397
Gilliland et al., Vawter v.....	278	Kyle et al. v. Kyle.....	387
Givan et al., Vail, Adm'r, v.....	59	Kyle, Kyle et al. v.....	387
Glass v. Garber et al.....	336	Lacy, Tritlipo v.....	287
Goddard et al., Talbott v.....	496	Lanahan et al., Noon et al. v.....	262
Goodwin v. Owen et al.....	243	Lane et al. Peters v.....	391
Graeter v. Williams.....	461	Long et al. v. Dixon et al.....	352
Graham v. Castor.....	559	Low, Marsh v.....	271
Graham v. Graham et al.....	23	Louisville, New Albany & Chi- cago R. W. Co., Nicholson v.....	504
Graham et al., Graham v.....	23	Lowrey, Adm'r's, v. The City of Delphi.....	250
Graham v. Kennedy.....	209	Lucas v. Jarrell, Executor.....	41
Graham et al., Stow v.....	10	Lyon, The Jeffersonville, Madison & Indianapolis R. R. Co. v.....	477
Gregory v. Schoenell.....	101	Maginniss et al., Kern, Ex'r, et al. v.....	459
Griesel v. Schmal, Receiver.....	475	Maranda et al., Reeder et al. v.....	239
Gust, etc., Hill et al. v.....	45	Markle et al. v. The Board, etc., of Clay Co. et al.....	185
Hankins, Spath v.....	155	Marquardt et al., Studabaker et al., Ex'rs, v.....	341
Hart v. The State.....	599	Marsh v. Low.....	271
Harvey v. Osborn.....	535	Martin et ux., Moon et al. v.....	218
Haub v. Weathers	511	Marvel, by her next friend, Mar- vel, Emmerson v.....	265
Hayes v. The State.....	99	Meeker, Emmons et al. v.....	321
Hays v. Ford et al.....	52	Meyers et al. v. Brown et al.....	596
Heaton, Parker v.....	1	McCoy, The Town of Brazil v.....	512
Hedrick et al. v. Hedrick et al...	78	McGinnis et al., Gabe v.....	372
Hedrick et al., Hedrick et al. v...	78	McGinnis et al., Noble v.....	528
Hiatt v. Powell.....	149	McGuire et al., The Town of Bra- zil v.....	513
Hickman et al. v. Rayl.....	551	McOsker v. Burrell.....	425
Hilgenberg v. Wilson, Treasurer..	210	Michaelree, The Town of Brazil v.....	512
Hill, Burk et al. v.....	419	Michaelree, The Town of Brazil v.....	513
Hill et al. v. Gust	45	Miller v. Shields et al.....	71
Hogshead v. Williams et al.....	145	Mitchell v. Chambers.....	289
Holten v. The Board of Comm'rs of Lake Co.....	194	Moon et al. v. Martin et ux.....	218
Holtzman et al., Butler et al. v...	125		
Hottell v. Adamson et al.....	276		
Hurt, Guardian, Darnall et al. v.....	275		
Huston, Adm'r, Reid et al. v.....	173		
Hutts v. Williams	237		
Indianapolis, P. & C. R. W. Co. v. Crane et al.....	430		

TABLE OF CASES REPORTED.

v

Moore, Adm'r, v. The State, ex rel., etc.....	360	State, ex rel. Ellison, Schlosser et al. v.....	82
Naltner et al. v. Tappey.....	107	State, ex rel. Mabbitt, v. Smith....	385
Nash, Ball et ux. v.....	9	State, ex rel. Murphy, Brookbank v.....	169
Nelson v. Vorce.....	455	State, Hart v.....	599
Nicholson v. The Louisville, New Albany & Chicago R. W. Co....	504	State, Hayes v.....	99
Noble v. McGinnis et al.....	528	Stearns v. Dubois.....	257
Ogle et al. v. Dill et al.....	130	Stephenson v. Feezer et al.....	416
Ohio & Mississippi R. W. Co., Falkner v.....	369	Stilwell, Adm'r'x, et al. v. Corwin, Adm'r.....	433
Ohio & Mississippi R. W. Co. v. Vickery et al.....	509	Stilz et al. v. The City of Indianapolis et al.....	515
Osborn, Harvey v.....	535	Storey et al. v. Krewson et al.....	397
Owen et al., Goodwin v.....	243	Stow v. Graham et al.....	10
Palmer v. Blain.....	11	Studabaker et al. Ex'rs, v. Marquardt et al.....	341
Parker v. Heaton.....	1	Talbott v. Goddard et al.....	496
Pate v. Roberts.....	277	Talley, the Town of Brazil v.....	511
Patterson et al. v. Ransom.....	402	Tappey, Naltner et al. v.....	107
Peacock et al., Tracewell v.....	572	Thompson, Reish v.....	34
Peters v. Lane et al.....	391	Thompson, Simonton v.....	87
Pettit v. Braden.....	201	Tieman et al., Bartel v.....	438
Phillips, Adm'r, et al., Bowen v....	226	Town of Brazil v. Kress.....	14
Pittsburgh, Cincinnati & St. Louis R. W. Co. v. Eby.....	567	Town of Brazil v. Johnson et al.....	511
Posey v. Scales et al.....	282	Town of Brazil v. Talley.....	511
Powell v. DeHart.....	94	Town of Brazil v. McCoy.....	512
Powell, Hiatt v.....	149	Town of Brazil v. Genter.....	512
Prine, Johnson v.....	351	Town of Brazil v. Johnson.....	512
Ransom, Patterson et al. v.....	402	Town of Brazil v. Michaelree.....	512, 513
Rayl, Hickman et al. v.....	551	Town of Brazil v. McGuire et al.....	513
Reeder et al. v. Maranda et al....	239	Town of Brazil v. Ingoldsby.....	513
Reid et al. v. Huston, Adm'r.....	173	Town of Brazil v. Kress et al.....	513
Reish v. Thompson.....	34	Tracewell v. Peacock.....	572
Richardson, Adm'r, et al. v. The State, ex rel. Crow, etc.....	381	Vail, Adm'r, v. Givan et al.....	59
Ricketts v. Dorrel.....	470	Vance, Adm'r, et al., Wilson v....	584
Roberts, Pate v.....	277	Vance, Adm'r'x, Wilson v.....	394
Roe v. Cronkhite et al., Adm'rs....	183	Vawter v. Gilliland et al.....	278
Rogers et al., The Board, etc., of Lagrange Co. et al. v.....	297	Vickery et al., The Ohio & Mississippi R. W. Co. v.....	509
Rothrock et al. v. Carr et al.....	334	Vorce, Nelson v.....	455
Scales et al. Posey v.....	282	Warren Co. Ag'l Joint Stock Co. et al. v. Barr.....	30
Schlosser et al. v. The State, ex rel. Ellison.....	82	Watt, Guardian, v. De Haven....	128
Schmal, Receiver, Griesel v.....	475	Weathers, Haub v.....	511
Schoenell, Gregory v.....	101	Webb v. The Brandywine Junct'n Turnpike Co. et al.....	441
Sebrell et ux. v. Couch, Adm'r ...	122	Whitehall v. Conner.....	354
Shanklin v. City of Evansville....	240	Whitworth v. Blakey, Assignee....	510
Shields et al., Miller v.....	71	Wilds et al. v. Bogan.....	331
Simonton v. Thompson.....	87	Williams, Graeter v.....	461
Simpson, Adm'r, Ex Parte.....	415	Williams et al., Hogshead v.....	145
Smith, The State, ex rel. Mabbitt, v.....	385	Williams, Hutts v.....	237
Spath v. Hankins.....	155	Wilson et al., Dawson v.....	216
State, ex rel., etc., Fuhrer, Adm'r, v	150	Wilson, Treasurer, Hilgenberg v..	210
State, ex rel. Crow, etc., Richardson, Adm'r, v.....	381	Wilson v. Vance, Adm'r, et al....	584
State, ex rel. Denny, Att'y Gen'l, Moore, Adm'r, v.....	360	Wilson v. Vance, Adm'r'x.....	394
		Woody v. Fislar et al.....	592
		Young v. Baxter.....	188

TABLE OF THE CASES

CITED IN THIS VOLUME.

Abdil v. Abdil, 26 Ind. 287	391	Boone v. Eyre, 1 H. Bl. 273; 2 W. Bl. 1312	558
Abdil v. Abdil, 33 Ind. 460	424	Borum v. Fouts, 15 Ind. 50	345
Adams v. Cosby, 48 Ind. 153	599	Bowman v. Phillips, 47 Ind. 341 130, 393	
Adamson v. Rose, 30 Ind. 380.....	289	Boyd v. Blaisdell, 15 Ind. 73.....	428
Alexander v. Alexander, 48 Ind. 559	532	Boyd v. Longworth, 11 Ohio, 235..	412
Allen v. Anderson, 3 Humph. 581..	274	Boyle v. Guysinger, 12 Ind. 273..	558
Allen v. Hostetter, 16 Ind. 15	524	Bradley v. Bradley, 45 Ind. 67...	393
Allen v. Lee, 1 Ind. 58.....	260	Bradley v. The Brandywine, etc., Turnpike Co., 53 Ind. 70.....	449
Allen v. Nofsinger, 13 Ind. 494...	557	Brady v. Spurck, 27 Ill. 478	411
Allis v. Billings, 6 Met. 415.....	319	Braman v. Hawk, 1 Blackf. 392 ..	148
Andrews v. Paradise, 8 Mod., Case 240	557	Brannon v. May, 42 Ind. 92	289
Armstrong v. Murphy, 2 Ind. 601..	401	Braxton v. The State, ex rel., etc., 25 Ind. 82	538
Arnold v. Stanfield, 8 Ind. 323 ...	424	Breckenridge v. McAfee, 54 Ind. 141	469
Arnold v. The State, 52 Ind. 281..	600	Brightwell v. McLane, 11 Ind. 210.....	210
Atkinson v. Gwin, 8 Ind. 376.....	210	Brookbank v. Kennard, 41 Ind. 339.....	69
Atkisson v. Martin, 39 Ind. 242....	352	Brooks v. Harris, 42 Ind. 177.....	470
Baltimore, etc., R. R. Co. v. Wil- kinson, 30 Md. 224.....	372	Brooks v. Harris, 41 Ind. 390.....	588
Banfield v. Whipple, 14 Allen, 13. 50		Brown v. Freed, 43 Ind. 253.....	311
Bank of Columbia v. Hagner, 1 Pet. 455.....	557	Brown v. Metz, 33 Ill. 339.....	411
Barker v. Buell, 35 Ind. 297	502	Brown v. McCord, 20 Ind. 270....	321
Barker v. McClure, 2 Blackf. 14..	148	Buell v. Shuman, 28 Ind. 464.....	424
Barnaby v. Wood, 50 Ind. 405.....	83	Buffalo, etc., R. R. Co. v. Stigeler, 61 N. Y. 348.....	93
Barnes v. McKay, 7 Ind. 301.....	424	Buntin v. Rose, 16 Ind. 209.....	393
Barrett v. Williamson, 4 McLean, 589.....	341	Buser v. Blair, 47 Ind. 519.....	454
Bartonshill Coal Co. v. McGuire, 3 Macq. 300	50	Bush v. The Grover & Baker, etc., Co., 48 Ind. 258.....	454
Bartonshill Coal Co. v. Reed, 3 Macq. 266.....	50	Butler v. Myer, 17 Ind. 17	345
Bayley v. Greenleaf, 7 Wheat. 46..	594	Campbell v. Jones, 6 T. R. 570 ...	558
Beckel v. Petticrew, 6 Ohio State, 247.....	502	Carmichael v. Lawrence, 47 Ind. 554.....	139
Bickle v. Beseke, 23 Ind. 18.....	401	Carpenter v. Sigler, 47 Ind. 202.. 454, 568	
Birge v. Gardner, 19 Conn. 507 ...	50	Carr v. Howard, 8 Blackf. 190.....	148
Blake v. Sawin, 10 Allen, 340	50	Carter v. Harrison, 5 Blackf. 138..	428
Board of Comm'rs of Clay Co. v. Markle, 46 Ind. 96.....	186	Carter v. Towne, 98 Mass. 567.....	50
Booher v. Goldsborough, 44 Ind. 490.....	289		

Cary v. Gruman, 4 Hill, 625.....274	Comparet v. Hedges, 6 Blackf. 416.....210
Castle v. Duryee, 2 Keyes, 169... 50	Comparet v. Hanna, 34 Ind. 74...242
Cayzer v. Taylor, 10 Gray, 274... 49	Conwell v. Emrie, 4 Ind. 208.....428
Chapin v. The Persse & Brooks Paper Works, 30 Conn. 461.....502	Conwell v. Pumphrey, 9 Ind. 135.341
Chatterton v. Fox, 5 Duer, 64.....557	Cook v. New York Central R. R. Co., 3 Keyes, 476..... 50
Cheek v. Glass, 3 Ind. 286.....148	Coombs v. New Bedford Cordage Co., 102 Mass. 572..... 48
Cheney v. The Boston, etc., R. R. Co., 11 Met. 121.....372	Cotes v. Shorey, 8 Iowa, 416.....502
Chicago, etc., R. R. Co. v. Randolph, 53 Ill. 510.....372	Cox v. The State, 49 Ind. 568.....433
Christopher v. Austin, 1 Kern. 216557	Coyner v. Boyd, 55 Ind. 168.....321
Church v. The Town of Knights-town, 35 Ind. 177.....524	Crabb v. Atwood, 10 Ind. 322.....533
Cincinnati, etc., R. R. Co. v. Heaston, 43 Ind. 172.....413	Craig v. Secrist, 54 Ind. 419.....300
Cincinnati, etc., R. R. Co. v. Washburn, 25 Ind. 259.....393	Crawford v. Crockett, 55 Ind. 220.502
City of Aurora v. West, 9 Ind. 74.524	Crawford v. King, 54 Ind. 6..... 13
City of Cincinnati v. Evans, 5 Ohio State, 594341	Cromie v. Hoover, 40 Ind. 49.....192
City of Crawfordsville v. Barr, 45 Ind. 258.....225, 501	Cromwell v. Wilkinson, 18 Ind. 365.....557
City of Crawfordsville v. Johnson, 51 Ind. 397.....502	Cronise v. Kellogg, 20 Ill. 11.....274
City of Evansville v. Page, 23 Ind. 525524	Cronk v. Cole, 10 Ind. 485,.....144
City of Indianapolis v. Huffer, 30 Ind. 235199	Crosby v. Jeroloman, 37 Ind. 264.205
City of Indianapolis v. Sturm, 39 Ind. 159524	Crouse v. Holman, 19 Ind. 30.....319
City of Logansport v. Wright, 25 Ind. 512.....18, 213, 254	Cutchen v. Coleman, 13 Ind. 568..217
City of Terre Haute v. Ripley, 43 Ind. 508286	Dailey v. The State, 28 Ind. 235..172
Clark v. Benefiel, 18 Ind. 405.... 96	Davis v. England, 10 Jurist, (N. S.) 1235..... 50
Clark v. Butt, 26 Ind. 236.....557	Davis v. Easley, 13 Ill. 192.....474
Clarke v. Cummings, 5 Barb. 334. 78	Davis v. Fearis, 52 Ind. 128.....174
Clements v. Robinson, 54 Ind. 599. 98	Davis v. Perry, 41 Ind. 305..... 17
Cleveland, etc., R. R. Co. v. Bartram, 11 Ohio State, 457.....372	DeBruler v. Ferguson, 54 Ind. 549.....300
Cleveland, etc., R. R. Co. v. Brown, 45 Ind. 90.....571	Denny v. Williams, 5 Allen, 1.... 50
Cochnowar v. Cochnowar, 27 Ind. 253.....391	Depuy v. Clark, 12 Ind. 427.....418
Coe v. Smith, 1 Ind. 267.....557	Dickerson v. Turner, 15 Ind. 4....210
Colburn v. The State, etc., 47 Ind. 310.....382	Dietrich v. The Pennsylvania R. Co., 71 Pa. State 432.....472
Coffin v. Anderson, 4 Blackf. 395.172	Diversy v. Moor, 22 Ill. 330.....274
Cole v. Bansemer, 26 Ind. 94.....345	Doe v. West, 1 Blackf. 133.....197
Coleman v. Lyman, 42 Ind. 289...411	Dunn v. Sparks, 1 Ind. 397..... 57
Coleman v. South-Eastern R. W. Co., 4 H. & C. 699..... 50	Edmunds v. Gookins, 20 Ind. 477.524
Colerick v. McCleas, 9 Ind. 245...148	Edmunds v. Gookins, 24 Ind. 169..524
Collier v. Early, 54 Ind. 559.....183	Eisenlohr v. Swain, 35 Pa. State 107.....341
Colter v. Frese, 45 Ind. 96...224, 502	Ellison v. Wisheart, 29 Ind. 32...205
Coman v. The State, 4 Blackf. 241.....148	Elson v. O'Dowd, 40 Ind. 300.354, 424
	Emmons v. Carpenter, 55 Ind. 329.....328
	Emmons v. Meeker, 55 Ind. 321..329
	English v. Beard, 51 Ind. 489..... 83
	Erwin v. Scotten, 40 Ind. 389.....217
	Easliger v. Huebner, 22 Wis. 632.....502
	Evans v. Ashby, 22 Ind. 15.....424
	Evansville, etc., R. R. Co. v. Duncan, 28 Ind. 441.....372
	Excelsior Draining Co. v. Brown, 38 Ind. 384.....588
	Ex Parte Colter, 35 Ind. 109.....180

TABLE OF CASES CITED.

ix

Ex Parte Haase, 50 Ind. 149.....386	Harper v. Delp, 3 Ind. 225, 224...269
Ex Parte Heffren, 27 Ind. 87.....180	Harris v. Rivers, 53 Ind. 216.....476
Faithorne v. Blaquire, 6 M. & S. 73.423	Harter v. Moore, 5 Blackf. 367 .148
Fankboner v. Fankboner, 20 Ind. 62.....124	Hartman v. Lee, 30 Ind. 281.....413
Farman v. Ratcliff, 42 Ind. 537...454	Hasselman v. McKernan, 50 Ind. 441.....309
Farmers & Mechanics' Bank v. Rathbone, 26 Vt. 19.....273	Hauser v. Roth, 37 Ind. 89.....210
Ferris v. Johnson, 27 Ind. 247....210	Hayes v. Flowers, 25 Miss. 169... 57
Fischli v. Fischli, 1 Blackf. 360..424	Hays v. Blizzard, 30 Ind. 457.....468
Fitchburg Cotton M'f'g Corp. v. Melven, 15 Mass. 268.....557	Hays v. Parrish, 52 Ind. 132.....321
Fletcher v. Holmes, 25 Ind. 458..424	Hayward v. Davidson, 41 Ind. 212.200
Fogg v. The Inhabitants of Na- hant, 98 Mass. 578..... 50	Heaston v. Colgrove, 3 Ind. 265 210, 557
Forsyth v. Hooper, 11 Allen, 419.. 50	Heavenridge v. Mondy, 34 Ind. 28.470
Fountain v. Draper, 49 Ind. 441.. 88	Heddens v. Younglove, 46 Ind. 212.225
Francis v. Porter, 7 Ind. 213.....401	Hedrick v. Hedrick, 55 Ind. 78...521
Freeman v. The State, 18 Ind. 484.....413	Hefner v. Dawson, 63 Ill. 403.....208
French v. Blanchard, 9 Ind. 260..210	Hefner v. Vandolah, 62 Ill. 483..208
Fromer v. The State, 49 Ind. 580..238	Hibbard v. The New York & Erie R. R. Co., 15 N. Y. 455.....372
Fulkerson v. Armstrong, 39 Ind. 472.....286	Highfill v. McMickle, 39 Ind. 270.237
Fuller v. The State, 1 Blackf. 63..440	Hill v. Bishop, 25 Ill. 349502
Fultz v. Wycoff, 25 Ind. 321.....341	Hill v. Braden, 54 Ind. 72.....225
Gander v. The State, ex rel., etc., 50 Ind. 539.....476	Holmes v. Bybee, 34 Ind. 262.....309
Gatling v. Rodman, 6 Ind. 289...424	Hopkins v. Stanley, 43 Ind. 553...393
Gavin v. Burton, 8 Ind. 69..... 41	Horner v. Doe, 1 Ind. 130.....55, 424
Gavin v. Graydon, 41 Ind. 559...424	Huffman v. The Indiana Nat'l Bank, etc., 51 Ind. 394.....455
Gaylor v. McHenry, 15 Ind. 383..249	Hughart v. Lenburg, 45 Ind. 498..160
Gaynor v. Old Colony & Newport R. W. Co., 100 Mass. 208..... 50	Hughes v. Sellers, 34 Ind. 337.81, 281
Gilman v. Eastern R. R. Corp., 10 Allen, 233..... 50	Hunt v. The State, 53 Ind. 321....218
Gilman v. Eastern R. R. Co., 13 Allen, 433..... 50	Hunter v. Bales, 24 Ind. 299309
Ginn v. Collins, 43 Ind. 271.....413	Hurlbut v. Post, 1 Bosw. 28.....557
Glenn v. Porter, 49 Ind. 500.....144	Hyatt v. Mavity, 34 Ind. 415.....533
Gorgas v. Douglas, 6 S. & R. 512.502	Hymes v. Aydelott, 26 Ind. 431...428
Grant v. Ellicott, 7 Wend. 227....273	Indianapolis, etc., R. R. Co. v. Irish, 26 Ind. 268.....571
Grant v. Johnson, 1 Seld. 247.....557	Indianapolis, etc., R. R. Co. v. Robinson, 35 Ind. 380481
Green v. Cheek, 5 Ind. 105.....524	Indianapolis, etc., Union v. The Cleveland, etc., R. W. Co., 45 Ind. 281.....454
Green v. Tanner 8 Met. 411.....166	Ireland v. Montgomery, 34 Ind. 174.....557
Greenup v. Crooks, 50 Ind. 410...424	Jaqua v. Montgomery, 38 Ind. 36.208
Griesel v. Schmal, 55 Ind. 475....472	Jeffersonville, etc., R. R. Co. v. Ad- ams, 43 Ind. 402.....482
Griffith v. Clark, 18 Md. 457.....423	Jeffersonville, etc., R. R. Co. v. Daugherty, 40 Ind. 33.....428
Grimes v. Piersol, 25 Ind. 246.....331	Jeffersonville, etc., R. R. Co. v. Lanham, 27 Ind. 171199
Grimes' Executors v. Harmon, 35 Ind. 198.....300	Jeffersonville, etc., R. W. Co. v. Underhill, 40 Ind. 229.....482
Grizzle v. Frost, 3 Fost. & Finl. 622..... 50	Jetter v. New York and Harlem R. R. Co., 2 Keyes, 154..... 50
Grout v. Townsend, 2 Hill, 554...260	Johns v. Harrison, 20 Ind. 317 ...331
Guard v. Risk, 11 Ind. 156.....268	Johnson v. Miller, 47 Ind. 376....424
Gulick v. Connely, 42 Ind. 134...393	Johnson v. Powell, 9 Ind. 566557
Halstead v. Brown, 17 Ind. 202...148	Johnson v. The Concord R. R. Corp., 46 N. H. 213.....372
Hanna v. The Board of Comm'rs, etc., 29 Ind. 170.....200	
Harding v. Larkin, 41 Ill. 413....411	

TABLE OF CASES CITED.

Johnson v. The Hudson River R. Co., 20 N. Y. 65.....	50	Marcus v. The State, 26 Ind. 101..	393
Jolly v. The Terre Haute Draw-Bridge Co., 6 McLean, 236.....	341	Marion T'p G. R. Co. v. Sleeth, 53 Ind. 35.....	448
Jones v. Van Patten, 3 Ind. 107...	210	Marshall v. Beeber, 53 Ind. 83...	472
Julian v. Beal, 26 Ind. 220.....	309	Martin v. Asher's Adm'r, 25 Ind. 237.....	533
Kase v. John, 10 Watts, 107.....	274	Maxwell v. Boyne, 36 Ind. 120....	393
Kemp v. Mitchell, 36 Ind. 249....	166	May v. Fletcher, 40 Ind. 575.....	309
	309	Mayor, etc., of Jeffersonville v. Weems, 5 Ind. 547.....	524
Kemp v. Smith, 7 Ind. 471....	168, 321	M'Cord v. Ochiltree, 8 Blackf. 15.	300
Kern v. Maginniss, 41 Ind. 398...	460	McAfee v. Crofford, 13 How. U. S. 447.....	341
Kerr v. Forgue, 54 Ill. 482.....	50	McCaffrey v. Corrigan, 49 Ind. 175.	424
King v. Roe, 56 Ind. 1.....	424	McCormick v. Sullivant, 10 Wheat. 192.....	56
Kingdon v. Nottle, 4 M. & S. 53...	411	McCulloch v. Dawson, 1 Ind. 413.	557
Kirby v. Studebaker, 15 Ind. 45..	148	McDaniel v. Carver, 40 Ind. 250	354, 424
Knight v. The Flatrock, etc., Turnpike Co., 45 Ind. 134.....	588	McDill v. Gunn, 43 Ind. 315.....	260
Knoefel v. Williams, 30 Ind. 1.....	56	McElfresh v. Guard, 32 Ind. 408..	393
Krach v. Heilman, 53 Ind. 517...	183	McKinney v. Springer, 6 Ind. 453.	210
Krutz v. Craig, 53 Ind. 561..	353, 396	McLaughlin v. Shelby T'w'p, 52 Ind. 114.....	8, 139
	472, 477	Meek v. Keene, 47 Ind. 77...130,	549
Laber v. Cooper, 7 Wal. 565.....	50	Menifee v. Clark, 35 Ind. 304.....	148
Ladue v. The Detroit, etc., R. R. Co., 13 Mich. 380.....	494	Mercer v. Patterson, 41 Ind. 440..	124
Lacy v. Mitchell, 23 Ind. 67.....	468	Meredith v. Lackey, 14 Ind. 529..	208
Lambert v. Sandford, 2 Blackf. 137.....	273	Miles v. Vanhorn, 17 Ind. 245....	270
Landers v. Douglas, 46 Ind. 522..	354	Milholland v. Pence, 11 Ind. 203.	96
	424	Mitchell v. Chambers, 55 Ind. 279.	467
Lane v. Miller, 27 Ind. 534.....	135	Moffit v. The M. D. Ass'n, 48 Ind. 107.....	198
Laney v. Laney, 4 Ind. 149.....	424	Moore v. Holcomb, 3 Leigh, 597..	595
Larimore v. Hornbaker, 21 Ind. 430.....	557	Morse v. Toppan, 3 Gray, 411....	422
Lawrence v. French, 25 Wend. 443.....	557	Morrison v. McFarland, 51 Ind. 206.....	8
Lawrence v. Lanning, 4 Ind. 194..	468	Morss v. Doe, 2 Ind. 65.....	197
Ledyard v. Chapin, 6 Ind. 320....	401	Morton v. Kane, 19 Ind. 191.....	557
Lewis v. Edwards, 44 Ind. 333....	352	Morton Gravel Road Co. v. Wy-song, 51 Ind. 4.....	238
Lewis v. Lewis, 30 Ind. 257.....	295	Mullinix v. The State, 10 Ind. 5..	210
Leyner v. The State, 8 Ind. 490...	238	Murdock v. Ford, 17 Ind. 52.....	309
Lightburn v. Cooper, 1 Dana, 273..	274	Murray v. Judah, 6 Cow. 484.....	273
Lipprant v. Lipprant, 52 Ind. 273.....	269	Musselman v. Kent, 33 Ind. 452	349, 527
Linsman v. Huggins, 44 Ind. 474..	454	Naylor v. Moody, 3 Blackf. 92....	148
Linville v. Earlywine, 4 Blackf. 469.....	268, 269	Nebeker v. Cutsinger, 48 Ind. 436.	144
Little v. The Danville, etc., Plank Road Co., 18 Ind. 86.....	238	Nelson v. Blakey, 54 Ind. 29.....	510
Little v. Thompson, 24 Ind. 146..	80	New Haven Steamboat, etc., Co. v. Vanderbilt, 16 Conn. 420....	341
Longworth's Ex'rs v. The City of Evansville, etc., 32 Ind. 322....	524	Newkirk v. Burson, 28 Ind. 435..	345
Loomis v. Wilbur, 5 Mason, 13...	77	Nicholson v. Caresa, 45 Ind. 479..	29
Lovett v. Salem, etc., R. R. Co., 9 Allen, 557.....	50	Noakes v. Morey, 30 Ind. 103	393
Lucas v. Peters, 45 Ind. 313.....	461	Noble v. Enos, 19 Ind. 72.....	393
Lynch v. Jennings, 43 Ind. 276.	309, 401	Noble v. The State, 39 Ind. 352...	39
Lytle v. Lytle, 37 Ind. 281.....	588	North-Western Conf. of Universalists v. Myers, 36 Ind. 375...	413
Maggart v. Chester, 4 Ind. 124....	557	North Penn. R. R. Co. v. Mahoney, 57 Pa. State, 187.....	50
Mangam v. The Brooklyn R. R. Co., 38 N. Y. 455.....	50		

TABLE OF CASES CITED.

xi

O'Byrne v. Burn, 16 Court Sess. Cas., 2d Series, 1025.....	50	Solomon v. Bradshaw, 4 Cro. Jac. 304.....	557
Offutt v. Earlywine, 4 Blackf. 460.268		Sand Creek Turnpike Co. v. Rob-	
Ogg v. Tate, 52 Ind. 159.....	502	bins, 41 Ind. 79.....	450
Ohio, etc., R. W. Co. v. Apple-		Sands v. Thompson, 43 Ind. 18....	4
white, 52 Ind. 540.....	372	Sarles v. Sarles, 8 Sand. Ch. 601..	77
Ohio, etc., R. W. Co. v. Hember-		Schurick v. Kollman, 50 Ind. 336.269	
ger, 43 Ind. 462.....	549	Scott v. The Indianapolis Wagon	
O'Kane v. Kiser, 25 Ind. 168.....	557	Works, 48 Ind. 75.....	17
Pace v. Openheim, 12 Ind. 533....	210	Seaver v. Boston, etc., R. R., 14	
Pattison v. Jenkins, 33 Ind. 87....	237	Gray, 466.....	49
Pea v. Pea, 35 Ind. 387.....	192, 393	Selking v. Jones, 52 Ind. 409.....	455
Pickens v. Bozell, 11 Ind. 275....	558	Seller v. Lingerian, 24 Ind. 264..	309
Piersol v. Grimes, 30 Ind. 129....	331	Shaffer v. Richardson's Adm'r, 27	
Pitman v. Conner, 27 Ind. 337....	260	Ind. 122.....	249
Pittsburgh, etc., R. W. Co. v.		Shanks v. Albert, 47 Ind. 461.....	289
Heck, 50 Ind. 303.....	289	Shelbyville, etc., R. R. Co. v. Le-	
Pittsburgh, etc., R. W. Co. v. Nu-		wark, 4 Ind. 471.....	341
zum, 50 Ind. 141.....	372	Sherlock v. Alling, 44 Ind. 184...549	
Polley v. Lenox Iron Works, 4		Sherlock v. The First National	
Allen, 329.....	50	Bank, etc., 53 Ind. 73.....	472
Potter v. Smith, 36 Ind. 231.....	350	Sherman v. Hogland, 54 Ind. 578 69	
Preston v. Sandford's Adm r, 21		Sherman v. Sherman, 3 Ind. 337..	401
Ind. 156.....	210, 424	Shiel v. Ferriter, 7 Blackf. 574...197	
Prettyman v. The Supervisors,		Shimer v. Bronnenburg, 18 Ind.	
etc., 19 Ill. 406.....	188	363.....	271
Price v. Pollock, 47 Ind. 362.....	346	Shinloub v. Ammerman, 7 Ind.	
Proctor v. Baker, 15 Ind. 178.....	309	347.....	268
Pulley v. Perfect, 30 Ind. 379.....	583	Shookley v. Shockley, 20 Ind. 108.235	
Raber v. Jones, 40 Ind. 436.....	226	Shook v. The Board of Comm's,	
Ratcliff v. Leunig, 30 Ind. 289...413		etc., 6 Ind. 461.....	148
Ray v. McMurtry, 20 Ind. 307....	208	Shook v. The State, ex rel., etc., 6	
Reed v. Inhabitants of Northfield,		Ind. 113.....	148
13 Pick. 94.....	50	Shumaker v. Johnson, 35 Ind. 33.424	
Regina v. Bond, 1 Den. C. C. 517.602		Sims v. McClure, 52 Ind. 267...8, 139	
Reeves v. Plough, 41 Ind. 204....	393	Smith v. Denman, 48 Ind. 65.....	533
Rex v. Craven, Russ. & Ry. 14...602		Smith v. Dodds, 35 Ind. 452..352, 424	
Rhode v. Green, 26 Ind. 83.....	412	Smith v. Jewett, 40 N. H. 530.....	78
Rich v. Starbuck, 51 Ind. 87.....	331	Smith v. O'Connor, 48 Pa. State,	
Richmond v. Robinson, 12 Mich.		218.....	50
193.....	165	Snow v. Housatonic R. R. Co., 8	
Rinard v. West, 48 Ind. 159.....	413	Allen, 441.....	49
Rinehart v. Bowen, 44 Ind. 353...286		Sohier v. Eldridge, 103 Mass. 345 78	
Ringle v. Bicknell, 32 Ind. 369...210		Spahr v. Nicklaus, 51 Ind. 221	
Robinius v. Lister, 30 Ind. 142...260		269, 476	
Robinoe v. Doe, 6 Blackf. 85.....	197	Sparks v. Clapper, 30 Ind. 204.....	237
Rockhill v. Spraggs, 9 Ind. 30....	260	Spaulding v. Thompson, 12 Ind.	
Rodebaugh v. Hollingsworth, 6		477.....	424
Ind. 339.....	270	Spencer v. Burton, 5 Blackf. 57....	557
Rodgers v. Lacey, 23 Ind. 507....	271	Spencer v. Morgan, 5 Ind. 146....	418
Roosevelt v. The Bull's Head		Spencer's Case, 5 Co. 16.....	411
Bank, 45 Barb. 579.....	401	Spitler v. James, 32 Ind. 202..326, 331	
Rose v. Duncan, 49 Ind. 269.....	401	Stanford v. Stanford, 42 Ind. 485.533	
Rosser v. Barnes, 16 Ind. 502.....	393	State v. Hope, 15 Ind. 474.....	100
Rowell v. Klein, 44 Ind. 290.....	393	State v. Thomas, 50 Ind. 292.....	100
Buckle v. Barbour, 48 Ind. 274...309		State, ex rel., etc., v. Giles, 52	
Ruckman v. Cowell, 1 N. Y. 505..	55	Ind. 356.....	367
Russell v. Harrison, 49 Ind. 97...455		State, ex rel., etc., v. Temple, 50	
Sage v. Brown, 34 Ind. 464.....	393	Ind. 585.....	367

Stein v. Indianapolis, etc., Ass'n, 18 Ind. 237.....	245	Vanblaricum v. Ward, 1 Blackf. 50.....	440
Stephens v. Muir, 8 Ind. 352.....	344	Vance v. Cowing, 13 Ind. 460.....	210
Stewart v. Ritterskamp, 54 Ind. 357.....	103	VanDusen v. Kindleburger, 44 Ind. 282.....	454
Stipp v. The Washington Hall Co., 5 Blackf. 16.....	424	VanNest v. Kellum, 15 Ind. 284.....	412
St. Louis, etc., R. W. Co. v. Myr- tle, 51 Ind. 566	372	Vater v. Lewis, 36 Ind. 288.....	393
Street v. Chapman, 29 Ind. 142...	289	Vidal v. Girard's Ex'rs, 2 How. U. S. 127	302
Strohecker v. Barnes, 21 Ga. 430...	557	Voorhees v. Earl, 2 Hill, N. Y. 288.....	274
Sullivan v. Sullivan, 34 Ind. 368...	386	Wagner v. Ewing, 44 Ind. 441....	424
Summers v. Hutson, 48 Ind. 228...	220	Wait v. Maxwell, 5 Pick. 217....	319
Thomas v. Hunter, 44 Ind. 477...	271	Wallace v. Brown, 41 Ind. 436...	220
Thornton v. Wynn, 12 Wheat. 183...	274	Warren Co. Ag'l, etc., Co. v. Barr, 55 Ind. 30.....	336
Thurston v. Boardman, 48 Ind. 426...	454	Waugh v. Waugh, 47 Ind. 580....	268
Tobias v. Rogers, 13 N. Y. 59.....	57	Webb v. Baird, 27 Ind. 368.....	330
Toledo, etc. R. W. Co. v. Cohen, 44 Ind. 444.....	571	Wesley v. Milford, 41 Ind. 413....	454
Toledo, etc., R. W. Co. v. God- dard, 25 Ind. 185.....	295	West v. Cutting, 19 Vt. 536.....	274
Toledo, etc., R. W. Co. v. Milli- gan, 52 Ind. 505.....	476	West v. Emmons, 5 Johns. 179....	287
Toledo, etc., R. W. Co. v. Owen, 43 Ind. 405.....	483	Western Gravel road Co. v. Cox, 39 Ind. 260.....	341
Town of Brazil v. Kress, 55 Ind. 14.....	511, 512, 513	Wheeler v. Carpenter, 9 Ind. 153...	210
Town of Edinburg v. Hackney, 54 Ind. 83.....	20	Whittaker v. The Inhabitants of West Boylston, 97 Mass. 273...	50
Town of Ligonier v. Ackerman, 46 Ind. 552.....	14, 20	White v. Moseley, 8 Pick. 356....	341
Town of Martinsville v. Frieze, 33 Ind. 507.....	19	Willard v. Tillman, 2 Hill, N. Y. 274.....	411
Town of Princeton v. Vierling, 40 Ind. 340.....	14, 20	Williamson v. Barrett, 13 How. U. S. 101.....	341
Town of Sullivan v. McCammon, 51 Ind. 264.....	20	Wilson v. Davis, 37 Ind. 141.....	413
Train v. Gridley, 36 Ind. 241.....	210	Wilson v. Harrison, 44 Ind. 468...	454
Trueblood v. Hollingsworth, 48 Ind. 537.....	588	Wilson v. Kinsey, 49 Ind. 35.....	331
Trout v. West, 29 Ind. 51.....	393	Wilson v. Martin, 1 Denio, 602...	557
Trustees of the Wabash & Erie Canal v. Spears, 16 Ind. 441....	428	Wilson v. Vance, 55 Ind. 394.....	430
Trustees of the Town of Prince- ton v. Manck, 35 Ind. 151.....	524	Wilson v. Vance, 55 Ind. 584.....	534
Turner v. Barry, 27 Ind. 163.....	309	Wiseman v. Macy, 20 Ind. 239...	424
Tyler v. Wilkinson, 10 Ind. 53 ...	210	Wood v. Kennedy, 19 Ind. 68.....	235
United States v. Tynen, 11 Wal. 88...	101	Woodfill v. The Town of Greens- burgh, 18 Ind. 203.....	524
		Woolfkiel v. The Sixth Avenue R. R. Co., 38 N. Y. 49.....	50
		Wright v. Bundy, 11 Ind. 398....	345
		Yater v. Mullen, 24 Ind. 277.....	469
		Yost v. Willis, 9 Ind. 548.....	413
		Zehnor v. Beard, 8 Ind. 96.....	510

J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
DURING THE TIME OF THESE REPORTS.

HON. JAMES L. WORDEN.* † §
HON. HORACE P. BIDDLE. ¶
HON. SAMUEL E. PERKINS. † §
HON. GEORGE V. HOWK. §
HON. WILLIAM E. NIBLACK. §
HON. ALEXANDER C. DOWNEY. †
HON. SAMUEL H. BUSKIRK. †
HON. JOHN PETTIT. † ||

* Chief Justice at the November Term, 1876.

† Chief Justice at the May Term, 1877.

‡ Term of office expired December 31st, 1876.

§ Term of office commenced January 1st, 1877.

¶ Term of office commenced January 4th, 1875.

|| Died June 17th, 1877, at Lafayette, Indiana.

OFFICERS.

**CLERK OF THE SUPREME COURT,
GABRIEL SCHMUCK.**

**SHERIFF OF THE SUPREME COURT,
JAMES P. WATSON.**

**LAW LIBRARIAN,
FREDERICK HELNER.**

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1876, IN THE
SIXTY-FIRST YEAR OF THE STATE.

PARKER v. HEATON.

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156	506

STATUTE OF FRAUDS.—*Verbal Agreement to Convey Real Estate.—Part Performance.*—A., the owner of certain real estate, in order to procure means to purchase certain other real estate of B., would be compelled to dispose of his own real estate, which could only be done at a certain sacrifice, of which he informed B. B. verbally agreed with A., that, if the latter would so dispose of his property and apply the proceeds of such sale to purchasing B.'s real estate, he, B., on a certain day, for a fixed price, would sell and convey his real estate to A. The latter thereupon disposed of his real estate, making such sacrifice, tendered to B. the proceeds of such sale, demanded of him that he so convey his said real estate to A., and, upon B.'s refusal to so sell and convey, brought an action for damages for a breach of such agreement.

Held, on demurrer for want of sufficient facts, that B.'s agreement to convey was within the statute of frauds, and that such action could not be maintained.

Held, also, that A.'s disposal of his property, at such sacrifice, was not such a part performance as would take B.'s agreement out of the operation of such statute.

VOL. LV.—1

Parker v. Heaton.

From the Clinton Circuit Court.

J. Claybaugh and *J. Campbell*, for appellant.

S. H. Doyal and *P. W. Gard*, for appellee.

Howe, J.—The appellant, as plaintiff, sued the appellee, as defendant, in the court below, alleging in his complaint, in substance, the following facts :

That on September 1st, 1874, the appellee made and entered into an agreement with appellant, whereby appellee agreed to sell and convey to appellant certain real estate, particularly described in said complaint, in Frankfort, Clinton county, Indiana, on or before September 15th, 1874, for the sum of four thousand dollars, payable in certain specified payments ; that when said agreement was made, appellant was the owner of certain real estate in Thorntown, Boone county, Indiana, of the value of twenty-five hundred dollars, which real estate, he then and there informed the appellee, he would have to sell at a sacrifice of eleven hundred dollars, to raise the money to purchase appellee's said property ; that appellee, at the time, told the appellant to sell his Thorntown property at said price, and he would sell the appellant said Frankfort property ; and it was then and there understood and agreed that appellant should sell his Thorntown property, at said sacrifice, and apply its proceeds on the purchase of said Frankfort property, which the appellee would sell and convey to appellant at the said date, pursuant to said agreement and understanding ; that appellant did sell his Thorntown property, at said sacrifice and reduction, and accepted the sum of fourteen hundred dollars therefor, when, in fact, said property was of the value of twenty-five hundred dollars ; that the appellant, still relying upon appellee's promise that he would sell and convey to appellant said Frankfort property, obtained from the proceeds of the sale of his Thorntown property the sum of five hundred dollars, and tendered the same to appellee, and demanded from him a deed for said Frankfort property,

Parker v. Heaton.

under said contract; that appellant in all things complied with his agreement, and sold his Thorntown property for the purpose of buying said Frankfort property of appellee and obtaining money to pay appellee for the same; but that the appellee, wholly disregarding his contract, failed, refused and neglected to convey said Frankfort property to appellant, although often requested so to do. And appellant averred, that by means of the premises he had sustained damages in the sum of fifteen hundred dollars, for which he demanded judgment and other proper relief.

Appellee demurred to appellant's complaint, for the want of sufficient facts therein to constitute a cause of action, which demurrer was sustained by the court below, and to this decision appellant excepted. And appellant declining to amend further, judgment was rendered by the court below, upon the demurrer, in favor of appellee and against the appellant.

In this court appellant has alleged as error the decision of the court below, in sustaining appellee's demurrer to appellant's complaint. And the only question presented by this alleged error for our consideration is this: Is appellant's case, as stated in his complaint, within the statute of frauds?

It is provided by the first section of the statute of this State, for the prevention of frauds, etc., "That no action shall be brought * * * upon any contract for the sale of lands; * * * unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; * * *." 1 R. S. 1876, p. 503. The alleged contract or agreement between the parties to this action, stated in appellant's complaint, and for an alleged breach of which, by appellee, the appellant has sued in this action to recover damages, was not in writing but was entirely parol. The case

Parker v. Heaton.

at bar, in our opinion, is wholly within the provisions of the section of the statute above cited. The whole case, briefly stated, seems to be this ; appellant wanted appellee's Frankfort property, and appellee agreed to sell his property to appellant for four thousand dollars, on certain terms, by a certain day ; and appellant owned Thorntown property worth twenty-five hundred dollars, which he told appellee he would have to sell at the reduced price of fourteen hundred dollars, in order to buy appellee's Frankfort property ; and appellee told the appellant to sell his Thorntown property, at said reduced price, and appellee would convey his Frankfort property to appellant, for four thousand dollars, at the time and upon the terms named ; and appellant sold his Thorntown property at the reduced price of fourteen hundred dollars, but appellee refused to sell and convey his property to appellant.

It is insisted by appellant's attorneys, that appellant's sale of his Thorntown property, at said reduced price, was such a part performance of the contract between the parties to this action, as would take the case out of the statute of frauds. But this position is wholly untenable. Appellant's sale of his Thorntown property was not a part of the contract between appellant and appellee. Appellee did not agree to buy the Thorntown property, and appellant did not agree that the proceeds of the sale of that property should be paid over to appellee. No doubt the Thorntown property was spoken of between the parties, in coming to their agreement about the appellee's property. But it can not be said, with any legal accuracy, that appellant's sale of his Thorntown property was a part performance of his alleged contract for the purchase of appellee's property. Upon this point of part performance, in connection with the statute of frauds, we cite the case of *Sands v. Thompson*, 43 Ind. 18, in which case WORDEN, J., elaborately examined and considered the whole question.

In the case now under consideration, the agreement

 Cravens, Assignee, v. Chambers et al.

stated in appellant's complaint was clearly within the statute of frauds, and the court below committed no error in sustaining appellee's demurrer to said complaint.

Judgment is affirmed, at appellant's costs.

CRAVENS, ASSIGNEE, v. CHAMBERS ET AL.

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SUPREME COURT.—*Appeal.—Statute Construed.*—Section 20 of "An act providing for voluntary assignments," etc., approved March 5th, 1859, 1 R. S. 1876, p. 142, does not, of itself, authorize the taking of an appeal to the supreme court.

SAME.—*Judgment.—Assignment for Benefit of Creditors.—Report of Assignee.*—The action of the circuit court in refusing to allow or approve a report, by the assignee of the property of an insolvent debtor, of the condition of his trust, is not a final judgment, nor an interlocutory order, from which an appeal will lie to the supreme court.

From the Ripley Circuit Court.

E. P. Ferris, for appellant.

J. D. Haynes and *J. K. Thompson*, for appellees.

WORDEN, C. J.—Cravens, the appellant, was the assignee in insolvency, of the property of Levi P. Faulkner, for the benefit of his creditors. He made a report, as such assignee, of the condition of the estate, according to which there appeared to be a balance in his hands of two hundred and twenty-four dollars and twenty-four cents, subject to such allowances as might be made to him thereafter.

Some of the creditors filed exceptions to the report, and the exceptions were sustained by the court, and the court refused to allow and approve the report. The assignee excepted, and has appealed to this court.

The question that meets us at the threshold is, whether an appeal lies to this court in such case.

The 20th section of the act on the subject of volun-

Cravens, Assignee, v. Chambers *et al.*

tary assignments for the benefit of creditors (1 R. S. 1876, pp. 142-147,) provides, that "Nothing in this act contained shall prevent any party or parties, who shall deem himself or themselves aggrieved by any order or decree of the court under this act from having an appeal as in other civil actions."

This section does not give an appeal, of itself, but, out of caution, provides that nothing in the act contained shall prevent an appeal "as in other civil actions." We must, therefore, determine whether in civil actions an appeal lies in such case.

An appeal in civil actions lies from all final judgments. 2 R. S. 1876, p. 238, sec. 550. But this was not a final judgment. It was merely an interlocutory order sustaining the exceptions to the report, and refusing to allow and approve the same.

Appeals also lie from interlocutory orders, in the following cases:

"*First.* For the payment of money; to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents or things in action.

"*Second.* For the delivery of possession of real property, or the sale thereof.

"*Third.* Granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation.

"*Fourth.* Orders and judgments upon writs of *habeas corpus*, made in term or vacation." 2 R. S. 1876, p. 245, sec. 576.

The order in this case is not embraced in the above specifications, and the appeal, in our opinion, does not lie.

The appeal is dismissed, with costs.

The City of Huntington v. Day.

THE CITY OF HUNTINGTON v. DAY.

CITIES AND TOWNS.—Parties.—School Corporation.—Summons.—Upon Whom Served.—An action against a city, to recover for the value of services rendered by the plaintiff, for the defendant, in the erection of school buildings by the latter, can not be maintained against such city in her ordinary, municipal capacity, but must be brought against her as “The School City of ——,” and the summons served upon her school trustees.

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126	289
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153	283
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From the Huntington Circuit Court.

B. F. Ibach and *G. W. Stultz*, for appellant.

L. P. Milligan, for appellee.

NIBLACK, J.—Day, the appellee, sued the city of Huntington “for work and labor, care and diligence, done and bestowed to, in and about the business of the defendant, by the plaintiff, as school trustee, at the special instance and request of the defendant.”

Accompanying the complaint was a bill of particulars, as follows:

“The City of Huntington

To Samuel F. Day,

Dr.

“To superintending building of school-house, from May the 1st, 1872, to March 31st, 1873, making 255 days, at \$2.50 per day, \$637.50.”

The appellant demurred to the complaint, assigning, as one of the grounds of objection, that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled by the court, to which the appellant excepted.

An answer and reply were then filed, forming an issue in the cause, and there was a trial, resulting in a verdict and judgment for the appellee.

The overruling of the demurrer to the complaint is assigned for error, in this court.

Our statute constitutes each incorporated town and city of the State a distinct municipal corporation for school purposes, and the school corporations thus created can

The City of Huntington v. Day.

contract and be contracted with, sue and be sued, in any court having competent jurisdiction. The school trustees for such incorporated towns and cities perform the duties of clerk and treasurer of their respective towns and cities, in all matters pertaining to the public schools. See 1 R. S. 1876, p. 780, sec. 4.

The distinction between the corporations organized for the purposes of ordinary civil administration, in such towns and cities, and those created out of them for school purposes, is fully recognized by other provisions of the statute. When a town or city is sued in its character as a civil, or ordinary municipal, organization for general purposes, the summons must be served on its mayor or other chief officer, or if he can not be found, then on its marshal. See, also, 2 R. S. 1876, p. 48, sec. 36. When sued as a school corporation, service must be on the school trustee. See 1 R. S. 1876, p. 810, sec. 144.

There is no averment in the complaint, in the case before us, which makes it a proceeding against the city of Huntington as a school organization. It is the "City of Huntington," and not the "School City of Huntington," which is sued.

The city, in the character in which it is sued in this action, has nothing to do with the erection of school-houses, either within its own limits or elsewhere, and, hence, can not be made liable for any services performed in building them. See *Sims v. McClure*, 52 Ind. 267; *McLaughlin v. Shelby Township*, 52 Ind. 114; *Morrison v. McFarland*, 51 Ind. 206; *Carmichael v. Lawrence*, 47 Ind. 554.

We think the complaint was clearly insufficient, and that, consequently, the court erred in overruling the demurrer to it.

Other questions were reserved on the trial of the cause, but the view we have taken of the complaint makes it unnecessary that we shall consider them as at present presented.

Ball et ux. v. Nash

The judgment is reversed, at the costs of the appellee, and the cause is remanded for further proceedings in accordance with this opinion.

BALL ET UX. v. NASH.

MISJOINDER.—Practice.—Supreme Court.—Error, in overruling a demurrer to a paragraph of a pleading, for a misjoinder therein of several causes of action, is not available on appeal to the Supreme Court.

From the Tippecanoe Circuit Court.

J. S. Williams, M. Jones, J. L. Miller and E. A. Greenlee, for appellants.

J. R. Coffroth, for appellee.

Howk, J.—In this action, the appellee, as plaintiff, sued the appellants, as defendants, in the court below, to recover the amount of certain promissory notes, executed by the appellant, John Ball, and to foreclose a certain mortgage, executed by both appellants, on certain real estate in Tippecanoe county, Indiana, to secure the payment of said notes. The appellee's complaint was in a single paragraph, and was in the usual form in such cases.

The appellants jointly demurred to appellee's complaint, for an alleged misjoinder of several causes of action, regarding each note as a separate cause of action, in a single paragraph of complaint. This demurrer was overruled by the court below, and to this decision appellants excepted.

Appellants then jointly answered, admitting the execution of the notes and mortgage mentioned in appellee's complaint, but averring that the same had been fully paid before the commencement of this action. To this answer, appellee replied in denial.

Stow v. Graham et al.

And this action, being at issue, was tried by the court below, without a jury, and a finding made and judgment rendered, in favor of appellee, for the amount due on the notes, and for the foreclosure of the mortgage and the sale of the mortgaged property.

There was no motion for a new trial, in the court below, and no objection or exception to any of the proceedings had after the issues were joined.

In this court, the appellants have separately assigned several alleged errors, only one of which is available to the appellants, in this court, as here presented, for any purpose.

The one available error, alleged by each of the appellants, is, that the court below erred in overruling their joint demurrer to appellee's complaint, for an alleged misjoinder of causes of action.

Appellants' attorneys have been kind enough not to urge this alleged error upon our consideration, and we might almost regard it as waived. We simply remark, in connection therewith,

1. That there is nothing in this alleged error; and,
2. That if there was, the 52d section of our code of practice expressly provides, that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." 2 R. S. 1876, p. 59.

The judgment of the court below is affirmed, with ten per centum damages, at the costs of the appellants.

STOW v. GRAHAM ET AL.

COSTS.—*When Judgment should carry Costs.*—Where the plaintiff, in an action for a money demand on a contract, recovers a judgment against the defendant, for a sum exceeding fifty dollars, exclusive of costs, he is also entitled to recover judgment for the costs of such action.

Palmer v. Blain.

From the Ripley Circuit Court.

W. D. Ward, J. B. Rebuck, J. W. Gordon, T. M. Browne and W. C. Lamb, for appellant.

WORDEN, C. J.—This was an action by the appellant, against the appellees, on certain promissory notes and a chattel mortgage, executed by William T. Graham to the plaintiff. The plaintiff recovered a judgment exceeding the sum of fifty dollars, but the defendants recovered a judgment against the plaintiff for the costs in the cause. The plaintiff duly excepted. As we understand the brief of counsel for the appellant, he asks a reversal only of that part of the judgment which relates to the costs. We have no brief for the appellee, and are at a loss to determine on what ground judgment for costs was rendered against the plaintiff. The record, so far as we can see, discloses no ground for such judgment. See 2 R. S. 1876, pp. 193-194, secs. 396-397.

William T. Graham was the maker of the notes and mortgage, and we think the plaintiff was entitled to a judgment for costs against him.

The judgment below, so far as it relates to costs, is reversed, with costs, and the cause remanded with instructions to the court below to render judgment in favor of the plaintiff, for costs, against the defendant William T. Graham.

PALMER v. BLAIN.

STATUTE OF FRAUDS.—*Verbal Promise.*—*Satisfaction of Execution.*—A verbal promise by one person, to the creditor of an execution on a judgment against a third person, that, if such creditor will satisfy such execution, such promisor will deliver certain personal property, and pay a certain sum of money, to such creditor, is not a promise to pay the debt of another, and is not within the statute of frauds, but is a valid contract,

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128	249

Palmer v. Blain.

for a breach of which an action may be maintained and damages recovered by such creditor, upon his satisfying such execution.

From the Whitley Circuit Court.

Walter Olds, for appellant.

PERKINS, J.—Appellee sued appellant, on the following complaint :

“Thomas W. Blain, plaintiff, complains of Catherine Palmer, defendant, and says, that, at the October term, 1874, this plaintiff recovered judgment against Oscar B. Palmer, son of defendant, for the sum of four hundred and twenty-five dollars, and costs of suit.

“That execution issued on said judgment, directed to the sheriff of said county of Whitley ; that said sheriff was about to levy said execution ; that on the 3d day of November, 1874, in consideration that the plaintiff would enter satisfaction upon said execution, for said sum of four hundred and twenty-five dollars, the defendant hereto agreed to give the plaintiff one cow, one horse, to remit ——— dollars, which the plaintiff then owed the defendant, to pay the plaintiff one hundred and thirteen dollars, in twelve months from that date, and to pay him one hundred dollars, within ten days from date. That the plaintiff did receipt and enter satisfaction upon said execution, for said sum of four hundred and twenty-five dollars, and defendant gave the plaintiff the cow and horse, and executed her note for said sum of one hundred and thirteen dollars, and remitted to the plaintiff said sum of ——— dollars, but has wholly failed and neglected to pay the plaintiff said sum of one hundred dollars, to be paid within ten days.

“Wherefore plaintiff demands judgment for said sum of one hundred dollars, with interest thereon from the 18th day of November, 1874.”

A demurrer for want of sufficient facts was overruled to this complaint, and exception taken, and appellant, electing to stand upon the ruling upon the demurrer, re-

Palmer v. Blain.

fused to answer; and the court, having heard evidence, assessed the appellee's damages at one hundred and one dollars. Appeal was taken, and the only error assigned here is the overruling of the demurrer to the complaint. And the only ground taken by counsel, in his brief, against the ruling upon the demurrer, is, that the promise, on which a recovery was sought and obtained, is within the statute of frauds.

The complaint shows that the appellant promised to pay the appellee certain sums of money, and transfer to him certain articles of property, if the appellee would satisfy a certain execution he held against the son of appellant. It was not a promise to pay the debt of another, but to transfer to appellee certain specific articles, be their value more or less, and pay a certain amount of money, in a certain time, if the appellee would extinguish a demand he had on a third person. It was an original promise to pay appellee money and deliver to him specific articles of property, in consideration of a benefit to be conferred upon a third person. The consideration was valid on both sides.

Chitty says, 1 Chitty Con. 28, "The general rule as to the sufficiency of the consideration seems to be, that it may arise either, 1st, by reason of a benefit resulting to the party promising, or to a third person, by the act of the promisee; or, 2dly, by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation," etc.

Here, the appellant promises the appellee, not that she will pay a debt of a third person to the appellee, but, that she will give him certain property and money, if he will do a certain act, viz., extinguish the debt due to him from a third person. He executes the contract on his part. It was a valid contract, good between the parties, on good considerations, mutually, and as it was not, on the part of appellant, a promise to pay the debt of another, it was valid, as to her, though not in writing. See *Crawford v.*

The Town of Brazil v. Kress.

King, 54 Ind. 6, at this term. The debt of the third person, being extinguished upon a valid promise, in this case, could not be enforced in the future.

The judgment below is affirmed, with costs.

THE TOWN OF BRAZIL v. KRESS.

PAYMENT.—*Voluntary Payment.—Pleading.—Cities and Towns.—Liquor License.*—In an action to recover moneys, paid by the plaintiff to the defendant, a town, for a license to sell intoxicating liquors, under an invalid penal ordinance of the latter, adopted under a void statute, the complaint averred that such payment was made “for the purpose of avoiding the penalty and forfeiture,” etc., “and to save himself from arrest and imprisonment for violating the provisions of said ordinance, as provided for by statute.”

Held, that such complaint does not show that such payment was not voluntary, and is therefore bad on demurrer for want of sufficient facts.

SAME.—*Cases Overruled.*—The cases of *The Town of Princeton v. Vierling*, 40 Ind. 340, and *The Town of Ligonier v. Ackerman*, 46 Ind. 552, are overruled, in so far as they conflict with the above decision.

CITIES AND TOWNS.—*Pleading.—Presumption.*—In an action against a town, the contrary not appearing by the complaint or otherwise, it will be presumed that such defendant was incorporated under the general law of this State for the incorporation of towns.

SUPREME COURT.—*Practice.—Sufficiency of Complaint.*—The sufficiency of the complaint in an action may be questioned, for the first time, in the Supreme Court, on appeal thereto, by assigning, as error, its insufficiency.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

Howk, J.—The appellee was the plaintiff, and the appellant was the defendant, in this action, in the court below.

In his complaint, the appellee alleged, in substance, that on the 2d day of April, 1868, the appellant, by its then board of trustees, adopted a certain ordinance, con-

The Town of Brazil v. Kress.

taining, among other things, a provision requiring all persons, who might engage in the sale of intoxicating liquors, within appellant's corporate limits, in a quantity less than a quart at a time, to procure a license therefor from appellant's corporate authorities, for which said person was required to pay, to appellant's proper officer, the sum of one hundred dollars, and providing, that, if any person should so sell any intoxicating liquors, within appellant's corporate limits, without having first procured such license, he should become liable, and forfeit to appellant, a fine, penalty and forfeiture of not less than one dollar, nor more than ten dollars, for each offence, to be recovered according to law, and a copy of said ordinance was filed with and made part of the complaint; that, afterward, on the — day of June, 1868, the appellee was desirous of pursuing the business of dealing in such intoxicating liquors, in said town of Brazil, and retailing the same in quantities less than a quart at a time, and for the purpose of avoiding the penalty and forfeiture, provided for in said ordinance for the violation of the provisions thereof, and to save himself from arrest and imprisonment for violation of the provisions of said ordinance, as provided by statute, he was compelled to and did pay to appellant's treasurer, as provided for in said ordinance, the sum of one hundred dollars, in June, 1868, and a like sum in June, 1870, making a total sum of two hundred dollars, paid by appellee for a license to sell intoxicating liquors, in said town, under said ordinance. And appellee averred, that said ordinance was adopted and enforced by appellant's authorities, and said moneys were extorted from appellee, by them, without right, and in violation of the laws of Indiana; that afterwards, on the — day of March, 1873, at a meeting of appellant's board of trustees, appellee demanded that said moneys should be refunded; that said board of trustees refused to comply with appellee's reasonable request; and appellee said, that the appellant was indebted to him in said sum of two hundred dol-

The Town of Brazil v. Kress.

lars, and interest thereon from dates of payment, as and for so much money had and received and extorted from appellee, for his use, which was then due and remained wholly unpaid. And appellee demanded judgment for three hundred dollars, and for other proper relief.

The ordinance, a copy of which was filed with and made a part of appellee's complaint, was adopted by appellant's board of trustees, on April 2d, 1868, and was entitled "An ordinance regulating the retailing of spirituous, vinous or malt liquors, repealing all former ordinances on the subject, and prescribing a penalty for violations thereof."

Section 1 provided, that no person should sell or barter, directly or indirectly, any intoxicating liquors, in a less quantity than a quart at a time, within the corporate limits of the town of Brazil, without having first procured from appellant's board of trustees a license, as provided in said ordinance; nor should any person, without having first procured such license, sell or barter any intoxicating liquors, to be drank or suffered to be drank in his house, out-house, yard, garden or the appurtenances thereto belonging.

Section 2 defined the words, "intoxicating liquors," as used in the ordinance.

Section 3 prescribed who might be licensed, and the mode of procuring a license.

Section 4 required that license should be granted to the applicant therefor, upon his showing that he had given the requisite notice, and that he was a man of good character and fit to be trusted with such license.

Section 5 fixed the license fee at one hundred dollars for one year.

Section 6 prescribed what the license should contain.

Section 7 limited the term of the license to one year.

Sections 8 and 9 are not in the record.

"Section 10. Any person, not being licensed according to the provisions of this ordinance, who shall sell or

The Town of Brazil v. Kress.

barter, directly or indirectly, any intoxicating liquors, in a quantity less than a quart at a time, or who shall sell or barter any intoxicating liquors, to be drank or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be fined in any sum not less than one dollar, nor more than ten dollars, for each offence."

Sections 11, 12, 13 and 14 are not in the record.

Appellant demurred to appellee's complaint, for the want of sufficient facts therein to constitute a cause of action; which demurrer was overruled by the court below. And the court below, for the want of an answer by appellant, assessed the appellee's damages against the appellant at two hundred and forty-eight dollars, and rendered the judgment accordingly from which this appeal is now here prosecuted.

In this court, the appellant has assigned the following alleged errors:

1. The appellee's complaint does not state facts sufficient to constitute a good cause of action against the appellant;

2. The court below erred, in overruling appellant's demurrer to appellee's complaint.

No exception was saved by appellant to the decision of the court below, in overruling its demurrer to appellee's complaint. But it is well settled, that a question, as to the sufficiency of the facts stated in a complaint to constitute a cause of action, is not waived by a failure to demur on that ground, or to except to the overruling of such demurrer, in the lower court, so as to prevent the consideration of such question by this court. *Davis v. Perry*, 41 Ind. 305; *Scott v. The Indianapolis Wagon Works*, 48 Ind. 75. On appeal to this court, the appellant may, as the appellant has done in this case, assign, as error, that the complaint does not state facts sufficient to constitute a cause of action. The sufficiency of the facts stated in ap-

The Town of Brazil v. Kress.

pellee's complaint, in this case, to constitute a cause of action against the appellant, is, therefore, properly presented by the first alleged error, and it is the only question before us, for consideration and decision.

The appellant is sued as an incorporated town; but it is not averred in the complaint, nor does it elsewhere appear in the record, under what law the appellant was incorporated. In the case of *The City of Logansport v. Wright*, 25 Ind. 512, it was held, by this court, that, in an action where a city is a party, it will be presumed, nothing appearing to the contrary, that it is incorporated under the general law of the State for the incorporation of cities. Adopting the doctrine of that case, and applying it to the case at bar, we hold that it will be presumed in this case, nothing appearing to the contrary, that the appellant was and is incorporated under the general law of this State, providing for the incorporation of towns, etc., approved June 11th, 1852. 1 R. S. 1876, p. 874.

The General Assembly of this State, by an act approved March 11th, 1867, undertook to amend the 7th clause of section 22 of the said general law for the incorporation of towns, etc., approved June 11th, 1852, so that towns, incorporated under said general law, might have the power "to license, regulate or restrain," among other things, "the sale of spirituous, vinous, malt and other intoxicating liquors within the corporation." 3 Ind. Stat. p. 121.

Under the power, which, it was supposed, had been conferred on such incorporated towns, by this amendatory act of March 11th, 1867, the appellant's board of trustees adopted the ordinance, a copy of which was filed with and made part of appellee's complaint in this action, to regulate the retailing of spirituous, vinous or malt liquors, and prescribing penalties for violations thereof, within the town of Brazil. And it was under the requirements of this ordinance, so adopted by appellant's board of trustees, in pursuance of the supposed power conferred by said

The Town of Brazil v. Kress.

amendatory act of March 11th, 1867, that the appellee paid the appellant, as license fees, the sums of money mentioned in, and sought to be recovered back by, appellee's complaint in this action.

It was decided by this court, in the case of *Town of Martinsville v. Frieze*, 33 Ind. 507, that the act of March 11th, 1867, to amend the 7th clause of section 22 of the general law for the incorporation of towns, etc., approved June 11th, 1852, *supra*, was not in conformity with the requirements of section 21, of article 4, of the constitution of this State, and was therefore void. The appellant's board of trustees had, therefore, no power whatever to adopt the ordinance, or to exact from appellee the payment of the license fees, mentioned in his complaint, but the ordinance in question was void, and the demands of appellant for license fees thereunder were wholly unauthorized by law.

The question now arises,—and it is the controlling question in this cause,—under the facts stated in the appellee's complaint, were the sums of money, which appellee paid the appellant for license fees, voluntary payments by appellee? If the appellee voluntarily paid the appellant the sums of money mentioned in his complaint, for license fees, he can not recover back the said sums of money, although the appellant demanded and received said moneys without any authority of law for so doing. The true test for determining the character of appellee's payments to appellant is this: Does it appear from the averments of appellee's complaint, that his payments to appellant were made for the purpose of procuring the release of appellee's person or property from the power of appellant's officers? If it does so appear, appellee's payments were not voluntary, and he would have a good cause of action to recover them back. But if it does not so appear, then the appellee's payments were voluntary, and his complaint does not state facts sufficient to constitute a

The Town of Brazil v. Kress.

cause of action against the appellant, for the recovery back of such payments.

Appellee alleged, in his complaint, that he paid the appellant the sums of money mentioned therein, "for the purpose of avoiding the penalty and forfeiture, provided for in said ordinance, for the violation of the provisions thereof, and to save himself from arrest and imprisonment for violating the provisions of said ordinance, as provided by statute."

This language is almost identical, word for word, with the language used by the appellee, in the case of *The Town of Sullivan v. McCammon*, 51 Ind. 264; in which case, upon the authority of the case of *The Town of Ligonier v. Ackerman*, 46 Ind. 552, it was held by this court, that "the complaint does not sufficiently show that the money was not voluntarily paid, and does not state a good cause of action." And see, also, the case of *The Town of Edinburg v. Hackney*, 54 Ind. 83, decided at the present term of this court, which is directly in point.

In the case at bar, we hold, that, under the averments of the appellee's complaint, his payments of the license fees, to the appellant, were voluntary payments, within the legal meaning of that term; and, therefore, that his complaint does not state facts sufficient to constitute a cause of action against the appellant.

The case of *The Town of Princeton v. Vierling*, 40 Ind. 340, and so much of the case of *The Town of Ligonier v. Ackerman*, 46 Ind. 552, as approves of the decision of the former case, are overruled.

The judgment of the court below is therefore reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to appellee's complaint, and for further proceedings in accordance with this opinion.

Jenkins et al. v. Corwin, Adm'r.

JENKINS ET AL. v. CORWIN, ADM'R.

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NEW TRIAL.—As of Right.—Foreclosure of Mortgage.—Statute Construed.—

An order of the circuit court, setting aside a judgment rendered by it in an action to foreclose a mortgage, on payment of costs, and granting a new trial of such cause, as of right, is void; such new trial not being authorized, in such an action, by section 601, 2 R. S. 1876, p. 252.

SAME.—Notice.—An order of the circuit court, vacating a judgment rendered by it in a cause, at a previous term, and granting a new trial thereof, made on the application of one party but without notice to the opposite party, is void.

SAME.—Record.—An order of a court, vacating a judgment rendered by it in a cause, at a previous term, and granting a new trial thereof, is no part of the original case.

APPEAL TO SUPREME COURT.—When.—An appeal to the Supreme Court, from a judgment rendered in the lower court, in a civil action, must be taken within three years, not from the decision of a motion to set aside an order granting a new trial of the cause, but, from the rendition of such judgment.

From the Jay Circuit Court.

J. W. Headington, J. N. Templer and R. S. Gregory, for appellants.

J. A. Harrison, for appellee.

WORDEN, C. J.—This was an action by Allen Makepeace, against the appellants and others, to foreclose a mortgage. Judgment of foreclosure was rendered, in favor of the plaintiff, at the July term of the court of common pleas, in the year 1870.

Afterwards, at the July term of said court, in the year 1871, some of the defendants in the original action appeared in that court and showed that they had paid the costs in that action, and moved that a new trial be granted to them, as a matter of right, under the provisions of section 601 of the code. 2 R. S. 1876, p. 252. No order is contained in the record, as sent up to us, granting the above motion, but the record shows, inferentially, that the motion was granted and a new trial ordered.

At the November term of the court, in the year 1871, the death of Makepeace was suggested, and John E. Cor-

Jenkins *et al.* v. Corwin, Adm'r.

win, his administrator, appeared specially and moved the court to set aside and vacate the previous order of the court, granting a new trial. This motion was sustained, and the previous order, granting a new trial, was set aside, vacated and annulled.

Two of the original defendants, only, have appealed and assigned error, and the appellee has pleaded the statute of limitations to the appeal.

The record was filed in this court March 16th, 1874, more than three years after the original judgment was rendered, but less than three years after the order of the court, setting aside the previous order granting a new trial.

By statute, appeals must be taken within three years from the time the judgment is rendered, except where the appellant is under disabilities. 2 R. S. 1876, p. 243, sec. 561. Here, the appellants do not appear to have been under any disabilities. We are of opinion that the three years commenced running from the time the original judgment was rendered, and not from the time when the order granting a new trial was set aside.

The order granting a new trial was no part of the original case, and, indeed, it seems to us to have been a nullity. The case was not one in which the parties were entitled to a new trial, on payment of costs, as a matter of right, under the statute. When the original judgment was rendered, and the term of the court had passed, the parties were out of court; and no motion to set aside the judgment and grant a new trial could have been entertained, without notice to the opposite party. The order granting a new trial was made, apparently, without notice to the plaintiff in the original action; and, if so, it was not erroneous, merely, but utterly void. If the order granting a new trial should be regarded as erroneous, merely, and not void, still the subsequent action of the court in vacating and setting it aside, left the original judgment standing as if no such order granting a new

Graham v. Graham et al.

trial had been made. In any view of the case, we think the appeal should have been taken within three years from the rendition of the original judgment.

The appeal is dismissed, with costs.

GRAHAM v. GRAHAM ET AL.

REAL ESTATE.—Action to Quiet Title.—Defence.—In an action to quiet the title to real estate, the defendant, under the general denial, can give in evidence all defences, either legal or equitable.

SAME.—Conveyance.—Deed.—Mortgage.—Vendor and Purchaser.—Notice.—

Where a deed of conveyance of real estate, though absolute on its face, is executed and intended simply as security for the payment of a debt owing from the grantor to the grantee, it amounts to a mortgage only, and confers no title upon a person who, having notice of such fact, obtains a conveyance of such real estate from such grantee.

VERDICT.—Special Finding.—Supreme Court.—Where, under the issues formed in a cause, evidence could have been given of a state of facts which would reconcile an apparent inconsistency between the general verdict and a special finding returned by the jury trying such cause, on appeal to the Supreme Court, from a judgment on such general verdict, it will be presumed, the evidence not being in the record, that such state of facts had been proved.

ESTOPPEL.—Conveyance.—Title Acquired after Conveyance by Quit-Claim.—

Where one, who, by a quit-claim deed, has conveyed real estate to which he had then no title, afterwards acquires title thereto, he is not estopped, by such quit-claim, from asserting his after-acquired title to such land.

From the Marion Superior Court.

C. Baker, O. B. Hord, A. W. Hendricks and D. V. Burns, for appellant.

E. T. Johnson, J. T. Dye and A. C. Harris, for appellees.

WORDEN, C. J.—This was an action to quiet the title to real estate, brought by the appellant, Amanda E. Graham, against the appellees, John J. Graham, her husband, and

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Graham v. Graham et al.

Phanuel Graham, her husband's mother. Her complaint is substantially as follows: She alleges that she is the owner of the real estate described in the complaint, the title to which she acquired by a quit-claim deed, dated February 10th, 1870, executed by defendant Phanuel, which was never recorded, but was lost or destroyed by defendant John; that Phanuel was denying the execution of the deed, and John was claiming to be the owner of the property; that a cloud was thus cast upon her title, which she prays to have removed, and that her title be quieted.

To this complaint the defendant Phanuel answered—

1st. By general denial.

2d. She alleges, by way of cross-complaint, that her co-defendant, John, was indebted to her in the sum of seven hundred dollars, on a note dated October 25th, 1865; that he was the owner of the real estate described in the complaint, and, on February 9th, 1870, conveyed it to her by a quit-claim deed as security for her debt. She files copies of the note and deed, says her debt is due and unpaid, that her deed is a mortgage, and asks that it be foreclosed, as such, for the payment of her debt.

3d. By way of further cross-complaint, she sets up a mortgage securing her said seven hundred dollar debt, which she says was signed by both Amanda and John, but was never delivered. She also prays for the foreclosure of this mortgage.

The appellant answered these cross-complaints by general denial. She also pleaded that the mortgage set up by Phanuel was signed by her without consideration. To this last answer Phanuel replied by general denial, and this closed the issues between Phanuel and appellant.

The defendant John J. Graham answered the complaint—

1st. By general denial.

2d. He says that he was indebted to Phanuel, his co-defendant, in the sum of seven hundred dollars, witnessed

Graham v. Graham et al.

by his note dated October 25th, 1865; that he was the owner of the real estate in controversy; that, on February 9th, 1870, he conveyed it to Phaniel by a quit-claim deed, (the same set up by Phaniel) as security for said debt; that this deed is still in full force, as a mortgage, and that he is the owner, in fee-simple, of the real estate, subject to the mortgage lien; that if plaintiff has ever received the conveyance from Phaniel, for said land, set forth in her complaint, it was without consideration, without his knowledge or consent, with full knowledge, on plaintiff's part, of his title, and of all the facts; that by plaintiff's assertions a cloud rests upon his title, which he asks to have removed.

3d. He pleads the coverture of the plaintiff.

4th. He avers that he executed the quit-claim to his co-defendant, Phaniel, as a mortgage, as he had before alleged; that afterwards it was orally agreed that Phaniel should convey the real estate to plaintiff, on condition that plaintiff should join with him in a mortgage of the realty, to Phaniel, to secure her debt; that plaintiff agreed to join with him in this mortgage; that, in pursuance of this agreement, Phaniel signed the deed to plaintiff, set up in the complaint, and delivered it to him, John, to be delivered to plaintiff when she should execute the mortgage; that plaintiff refused to execute the mortgage, and for this reason the deed was never delivered to her.

Appellant's demurrer was sustained to the third paragraph of this answer; she pleaded the general denial to the second and fourth, and this closed the issues between her and defendant John J. Graham.

The defendant John filed the general denial, to the cross-complaint of his co-defendant, Phaniel. He also denied, under oath, the execution of the mortgage set up in the third paragraph of Phaniel's cross-complaint. He further answered this cross-complaint, admitting that he had signed the mortgage, but averring that it was agreed by Phaniel, that, before it should be delivered to her, she

Graham v. Graham et al.

should reconvey his real estate to him, which she had failed to do, and for this reason he had not delivered the mortgage to her. He prays for the cancellation of the mortgage.

To these answers Phanuel filed a general denial, and this closed the issues between the two defendants.

Upon these issues the cause was tried by a jury.

During the trial the appellant and Phanuel made an agreement in writing, which was entered of record in the cause, by which appellant consented to the establishment and enforcement of Phanuel's lien on the real estate, as security for her debt.

This ended the controversy, so far as Phanuel was concerned, and from this point the contest proceeded between appellant and her husband.

The jury found—

First. A verdict in favor of Phanuel, assessing the amount of her debt, against John, at nine hundred and ninety-six dollars and twenty-five cents, and declaring her lien on the real estate.

Second. A general verdict in favor of defendant John J. Graham.

Third. They answered interrogatories, propounded to them by the court, on motion of the appellant, as follows:

“1st. Did not the defendant John J. Graham cause to be prepared, signed and acknowledged, the two deeds in evidence, releasing and quit-claiming to the grantees therein, the real estate therein described, situate in the county of Marion and State of Indiana, viz.: The east half of the north-east quarter of section 31, in township 15, of range 4; also, the west half of the north-west quarter of section 32, township 15, of range 4; one dated the 9th day of February, 1870, in which John J. Graham is grantor and Phanuel is grantee, and the other dated the 10th day of February, 1870, in which Phanuel is grantor and Amanda E. Graham is grantee?

"Answer. Yes.

"2d. Did not John J. Graham execute the deed described in the first interrogatory, wherein he was grantor, and Phaniel Graham grantee?

"Answer. Yes.

"3d. Did not John J. Graham cause said real estate to be conveyed to Phaniel Graham, so that she might convey the same to Amanda E. Graham?

"Answer. Yes.

"4th. Did not Phaniel Graham sign and acknowledge the deed in which she was grantor, and Amanda E. Graham grantee, mentioned in the first interrogatory, at the request of John J. Graham?

"Answer. Yes.

"5th. Was not said deed, from Phaniel Graham to Amanda E. Graham, delivered, by John J. Graham, to Isaac H. Vanhouton, the agent of Amanda E. Graham?

"Answer. No.

"6th. Did not John J. Graham afterward, without the consent of, or authority from, Amanda E. Graham, take said deed from the possession of Isaac H. Vanhouton?

"Answer. No.

"7th. Did not Phaniel Graham execute the deed mentioned in the first interrogatory, wherein she was grantor, and Amanda E. Graham grantee?

"Answer. Yes. A. SMITH, Foreman."

The appellant moved for judgment, in her favor, on the special findings, notwithstanding the general verdict against her. The motion was overruled, and judgment rendered, on the general verdict, for defendant John. And this is the only action of the court below, of which she is now complaining.

The evidence is not in the record.

The question arising in the record is, whether the general verdict, and the special findings of the jury in answer to interrogatories, can stand together. If they are

Graham v. Graham et al.

so inconsistent that both can not stand together, the latter must control the former.

We, however, see no necessary antagonism between the general verdict and the special findings.

The answer of the jury to the seventh interrogatory is the only one that seems to involve any difficulty. In that, the jury say that Phanuel Graham did execute the deed mentioned in the first interrogatory, wherein she was grantor, and Amanda E. Graham grantee. Whether the word *execute*, as used in the interrogatory, was used in a legal sense, so as to include a delivery, we need not enquire. For the purposes of the case we will assume that it was.

The plaintiff's complaint was to quiet her title to the land, she claiming it under an alleged deed to her, from Phanuel Graham, of the date of February 10th, 1870. To this complaint, the defendants could give in evidence any matter of defence, either legal or equitable, under the general denial. 2 R. S. 1876, p. 252, section 596; 2 R. S. 1876, p. 254, secs. 611-612.

It may be gathered from the answers of the jury to the interrogatories:

1st. That by quit-claim deed, bearing date February 9th, 1870, the defendant John J. Graham conveyed the property to Phanuel Graham.

2d. That by quit-claim deed, bearing date February 10th, 1870, Phanuel Graham conveyed the property to the plaintiff, Amanda E. Graham.

3d. That the purpose of John J. Graham, in conveying the property to Phanuel, was to enable the latter to convey it to the plaintiff. Now, if there is any supposable state of facts that could have been shown under the pleadings filed, including the general denial, under which, as we have seen, any matter of defence, either legal or equitable, could have been shown, we may suppose such facts were shown, and thereby reconcile the special findings with the general verdict. There might be, as we

think, several states of fact, that might have been shown, that would have reconciled the general verdict with the special findings. John J. Graham might have owed his mother, Phaniel Graham, and his purpose in making the deed to her may have been to secure her debt, purposing also that she should convey the property to Amanda E. Graham, his wife, with the understanding that his wife should join him in a mortgage of the property, back to his mother, to secure the debt. This the plaintiff may have refused to do, and the object of John J. in having Phaniel convey the property to the plaintiff may have failed. It may have been that the plaintiff refused to join her husband in the execution of the contemplated mortgage, before the deed was executed to her by Phaniel. Phaniel then would hold the deed from John J., to her, simply as a security for her debt. Indeed, if the deed from John J., to Phaniel Graham, though absolute on its face, was intended by the parties as security for a debt, it was but a mortgage; and once a mortgage, always a mortgage. If the conveyance from John J., to Phaniel Graham, was intended as a mortgage, it would seem that nothing whatever passed to the plaintiff, by the deed from Phaniel to her, she having notice of the facts, and the debt not having been assigned to her. The title to the property continued in John J., subject only to the mortgage. These facts would render the general verdict entirely consistent with the special findings.

We may suppose another state of facts, which might have been proved, that would have rendered the general verdict entirely consistent with the special findings.

When John J. Graham conveyed the property to Phaniel, he may have had no title whatever. He may have afterwards acquired a valid title. His deed to Phaniel, being only a quit-claim, did not work an estoppel, or prevent him from setting up, against the plaintiff, his after-acquired title. *Nicholson v. Caress*, 45 Ind. 479.

Warren County Agricultural Joint Stock Co. *et al.* v. Barr.

We can not say what was, or what was not, proved, the evidence not being in the record.

The judgment below is affirmed, with costs.

WARREN COUNTY AGRICULTURAL JOINT STOCK CO. ET AL. v.
BARR.

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COUNTY COMMISSIONERS.—*Appropriation.*—*Agricultural Society.*—*County Order.*—*County Treasurer.*—*Injunction.*—*Construction of Statute.*—The board of commissioners of a county are not authorized, by the act of March 8th, 1873, 1 R. S. 1876, p. 54, entitled "An act to encourage agriculture and agricultural fairs," etc., to make an appropriation to an agricultural society, out of the funds of such county, to assist such society in paying off its debts; and where, by the order of such board, such appropriation has been made, and the county auditor has issued a county order, on the funds of such county, for the payment of such appropriation, the payment of such county order, and the taking of any further steps toward paying such appropriation, may be enjoined, in a suit against the proper parties, by a taxpayer of such county.

From the Warren Circuit Court.

L. T. Miller and *W. C. Wilson*, for appellants.

J. M. Rabb, for appellee.

BIDDLE, J.—The appellee, a resident taxpayer of Warren county, brought this action to enjoin the payment of a certain county order, passed by the board of commissioners of Warren county, and issued by the county auditor, upon the county treasurer, payable to the Warren County Agricultural Joint Stock Company. The complaint contains two paragraphs. As a demurrer was sustained to the first paragraph, and there is no question raised upon it, we need not state it. The second paragraph is as follows:

"James I. Barr, plaintiff in the above entitled cause, complains of defendants, and says that he is a resident and taxpayer of Warren county, State of Indiana, and

Warren County Agricultural Joint Stock Co. *et al.* v. Barr.

the owner of six thousand dollars of real estate, situate in said county, subject to taxation; plaintiff further avers, that the said defendant, the Warren County Agricultural Joint Stock Company, is a private corporation, organized for the purpose of holding agricultural fairs in said county.

“Plaintiff further avers, that said defendants, the board of commissioners of Warren county, Indiana, at the December session, 1874, of said board, caused to be executed, upon the order book of said board, and the records of the county, the following order, to wit:

“‘Come now William Crow, James Goodwin and other citizens and taxpayers of Warren county, and ask the board to make an appropriation to the Warren County Agricultural Joint Stock Company, for the purpose of assisting in paying the debts of said association, and sustaining said fair association in the future, which the board take under advisement, and, after due deliberation and consideration, the board of commissioners, (Atkinson dissenting,) do grant said request, and do appropriate the sum of two thousand five hundred and fifty dollars for said purpose, which said sum is to be paid to the treasurer of said association; and the auditor is hereby authorized to issue a warrant on the county treasurer, in favor of the treasurer of said association, which said amount is not to be paid until the 1st day of December, 1875.’

“Plaintiff further avers, that afterward, to wit, on the 31st day of December, 1874, Samuel M. Frame and Andrew Buir, two of the members of said board of commissioners, met in the office of the auditor of said county, without having been called together by any officer authorized to convene said board; and that said parties, while so together, presuming to act as a board lawfully convened, caused to be spread upon the order book of said board of commissioners, and the records of said county, the following order, to wit:

“‘Ordered, by the board now here, that the order made by the board at the December term, 1874, in regular

Warren County Agricultural Joint Stock Co. *et al.* v. Barr.

session, in relation to the appropriation made to the Warren County Agricultural Joint Stock Company, was intended to mean that the warrant on the county treasurer, for said appropriation, was to issue at that time; and the auditor is hereby authorized and instructed to issue said order, on said county treasurer, for said appropriation, although the payment of said order is not to be made until the 1st day of December, 1875.'

"The plaintiff further avers, that said order was made by said board, upon their own motion, and at the verbal request of a few persons.

"Plaintiff further avers, that the auditor of said Warren county has issued his warrant, on said county treasurer, for said sum of two thousand five hundred and fifty dollars, so appropriated by said board of commissioners, to said Warren County Agricultural Joint Stock Company, and that the same is drawn payable to the treasurer of said company, and has been delivered by the said auditor, to the treasurer of said corporation.

"Plaintiff further avers, that said order of said board of commissioners, appropriating said money to said defendant, the Warren County Agricultural Joint Stock Company, is illegal and void, for the reason that said board had no lawful power or authority to make such appropriation, as is therein and thereby sought to be made.

"Plaintiff further avers, that the treasurer of said county will pay said order, when it becomes due, unless restrained by law; wherefore plaintiff prays the court to declare and adjudge said order, made by the defendant, the board of commissioners of Warren county, appropriating said sum of twenty-five hundred and fifty dollars to said defendant, the Warren County Agricultural Joint Stock Company, null and void.

"The plaintiff further prays, that the court, by its order, forever enjoin said defendants, the board of commissioners of Warren county, Indiana, and the Warren County Agricultural Joint Stock Company, from attempting to carry

into execution the said order of the said board of commissioners.

“Plaintiff further prays the court, by its order, to forever enjoin the said treasurer of said Warren county, and his successor in office, from paying, out of the funds of said county, the warrant so drawn upon him for the payment of said appropriation, or any other warrant that may be issued for the payment of said illegal appropriation, and for all other proper relief.”

The appropriation made by the board of commissioners was founded on the act of March 8th, 1873, 1 R. S. 1876, p. 54, the first section of which authorizes the board, on petition of a majority of the voters of a county, to purchase, in the name of the county, real estate, to be used for the purpose of agricultural and horticultural fairs. The second section provides for the payment of the consideration, and how the title shall be acquired; and the third authorizes a sale of such lands, if they become no longer an eligible location for such purposes. The fourth section enacts merely the emergency clause. This is all there is of the act.

We think the proceedings of the board of commissioners were without authority of law, and therefore wholly void. They had no jurisdiction in the premises. An authority to buy lands for a public purpose can not be construed into a power to gratuitously pay the debts of a private corporation.

The perpetual injunction was properly decreed, and the judgment is affirmed, with costs.

Reish v. Thompson.

REISH v. THOMPSON.

INFANT.—*Contract.—Disaffirmance.—Marriage Contract.—Judgment.—Satisfaction Of.*—Where an infant judgment creditor, by the promise of the judgment defendant and his replevin bail, that, upon her entering satisfaction of such judgment, the former will marry her, is induced, upon that consideration, alone, to enter such satisfaction, she may, upon her arriving at the age of twenty-one years, and upon the failure of said defendant to marry her, disaffirm such contract, and, in a suit against such judgment defendant and his replevin bail, have such entry of satisfaction vacated, notwithstanding the fact that at the time of making such marriage contract she was of the age of eighteen years.

From the White Circuit Court.

E. B. Sellers, for appellant.

Howe, J.—The appellee, as plaintiff, sued the appellant and one George Cunningham, as defendants, in the court below. In her complaint, the appellee alleged, in substance, that on August 5th, 1873, the State of Indiana, on the relation of the appellee, obtained a judgment, in the court below, against the defendant, George Cunningham, for three hundred dollars, and costs of suit, in a certain proceeding in bastardy, then pending in said court, in which judgment it was ordered that it should be paid in the following instalments, to wit, fifty dollars in four months, one hundred and twenty-five dollars in sixteen months, and one hundred and twenty-five dollars in twenty-eight months, from said August 5th, 1873; which said sums of money, it was adjudged, were to be paid to appellee, as the mother of the bastard child, or to its legal guardian; and appellee averred, that said order and judgment were so made for the use and benefit of the person, who might, up to the date of said judgment, have the care and custody of said child: and appellee averred, that she took care of said child, from the date of said judgment, until the death of said child in the fall of 1873, and thereby became and was, at the death of said child, entitled to said judgment; that on said August 5th, 1873, one

Reish v Thompson.

Alfred W. Reynolds filed a lien on said judgment for fifty dollars, for attorney's fees in obtaining said judgment; that after said judgment was rendered, and on the same day, the appellant became replevin bail for the stay of execution on said judgment, his undertaking, in that behalf, being entered in writing on the order book of the court below, in the words and figures following, to wit:

"I, Emanuel Reish, acknowledge myself replevin bail, for the payment of this judgment, at or before the expiration of the time allowed by law for the stay of execution upon such judgment, the same to be levied of my goods and chattels, lands and tenements; signed, August 5th, 1873.

"EMANUEL REISH."

That afterwards, on November 18th, 1873, the defendant, George Cunningham, and the appellant came to the appellee at Monticello, in White county, Indiana, where appellee was working, and said George Cunningham falsely and fraudulently represented to appellee, that he was ready and willing to marry her, and he and the appellant both solicited the appellee to sign an entry of satisfaction of said judgment, and the appellant falsely and fraudulently represented to appellee, that it was necessary that appellee should receipt said judgment, before she could be married to said defendant, Cunningham; and the appellee, relying on said false representations of the defendant, Cunningham, and the appellant, on said November 18th, 1873, entered satisfaction of said judgment, in the order book of said court, in writing, as follows:

"Received, of the defendant, satisfaction, in full, of the principal and interest of the above and foregoing judgment, November 18th, 1873. JEANETTE THOMPSON."

And appellee averred, that neither the defendant, Cunningham, nor the appellant, nor any other person, had paid anything on said judgment, and that said release was executed without any money being paid, and solely because of said false representations, and further that the

Reish v. Thompson.

defendant, Cunningham, immediately after procuring said release, left, and neither he nor the appellant said anything or did anything further, in pursuance of said agreement of marriage, although both professed to be anxious to have said marriage take place, before said entry of satisfaction of said judgment was obtained; that at the date of said entry of satisfaction, the appellee was a minor, under the age of twenty-one years; that appellee had since arrived at full age; and the appellee averred, that both the defendant, Cunningham, and the appellant well knew that their said representations were false, and that said George Cunningham never intended to perform his said contract of marriage, and that said agreement of marriage was made with the sole purpose of obtaining said entry of satisfaction of said judgment. Wherefore appellee demanded judgment, that said entry of satisfaction be set aside and held for naught, and that she have execution on said judgment, according to its terms; and she said that she had been damaged three hundred dollars, because of the said fraudulent representations, for which she demanded judgment, in addition to her prayer for specific relief, and also for general relief.

And the appellant demurred to appellee's complaint, for the following grounds of objection:

1. Because the complaint did not state facts sufficient to constitute a cause of action; and,

2. Because there was a defect of parties-plaintiffs, in this, that this action should have been brought in the name of the State of Indiana, on the relation of the appellee.

This demurrer was overruled by the court below, and to this decision appellant excepted.

This action was dismissed as to the defendant, George Cunningham, process not having been served on him. And the appellant then answered, in three paragraphs, the appellee's complaint, as follows:

1. A general denial.

Reish v. Thompson.

2. That, at the time said agreement and promise were made by the defendant, Cunningham, to the appellee, as stated in the complaint, she was over the age of eighteen years; wherefore appellant said that appellee ought not to recover in this action; and,

3. That, after the judgment, mentioned in appellee's complaint, was rendered in favor of the appellee, and against the defendant, Cunningham, the child of the appellee, for whose use and benefit said judgment was rendered, died; wherefore appellant prayed judgment for costs, and other proper relief.

Appellee demurred to the second and third paragraphs of appellant's answer, for the want of sufficient facts therein to constitute a defence to this action; which demurrer was sustained by the court below, and the appellant excepted.

And the action, being at issue, was tried by the court below, without a jury; and the finding of the court was for the appellee, and that the allegations of her complaint were true; and, over appellant's motion for a new trial, overruled and exception saved, the court rendered judgment, that the entry of satisfaction, in appellee's complaint mentioned, be vacated, set aside and held for naught, that appellee have execution on the judgment described in her complaint, and recover of appellant her costs in this action expended.

In this court, the appellant has assigned the following alleged errors:

1. Error of the court below, in overruling appellant's demurrer to appellee's complaint; and,

2. Error of the court below, in sustaining appellee's demurrer to the second and third paragraphs of appellant's answer.

With all proper respect for the appellant's learned attorney, who has argued his client's cause with much zeal and ingenuity, we are bound to say, that, in our opinion, there is no error in the record of this cause, of which the ap-

Reish v. Thompson.

pellant can be allowed or ought to complain. It is earnestly insisted, under the errors alleged, that the complaint, in this cause, does not contain or state facts sufficient to constitute a cause of action. The case made by appellee's complaint is, briefly, this : The appellee, a young girl, and not of lawful age, became the mother of a bastard child. In a proceeding, instituted for that purpose, on appellee's relation, the defendant, George Cunningham, was adjudged by the court below to be the putative father of appellee's child ; and, as such father, it was adjudged that he pay the sum of three hundred dollars, in certain specified instalments, at certain times, to appellee, as the mother, or to the legal guardian of said child. The appellant became replevin bail, for the stay of execution on said judgment, on the order book of the court below. A short time before the first instalment of said judgment became due and payable, the appellant and said Cunningham went together to the appellee, and Cunningham said that he was ready and willing to marry her, and they both solicited her to enter satisfaction of said judgment ; and appellant told her that she couldn't marry Cunningham, until she had receipted the judgment. By these means, the appellant and Cunningham procured the appellee to sign a receipt, on the order book of the court below, acknowledging satisfaction in full of the principal and interest of said judgment. At the time of signing said receipt, appellee was still an infant, under lawful age. And appellee averred, and appellant, by his demurrer, admitted it to be true, that the representations, made by appellant and Cunningham to appellee, were known by them to be false, that they both well knew that Cunningham never intended to perform his contract of marriage with the appellee, and that they both well knew that said promise of marriage was made with the sole purpose of obtaining the entry of satisfaction of said judgment.

In our opinion, there is no court in Christendom, which

Reish v. Thompson.

would tolerate or uphold the validity of a receipt, obtained by such an unmanly trick or artifice as this, by appellant's demurrer to appellee's complaint, confessedly was. Appellant and Cunningham both knew, that the poor unfortunate girl, having fallen from her estate in decent society, would readily do anything within her power, to be made an honest woman, by marriage with the father of her child. And therefore, they approached her with a specious but false promise of marriage to Cunningham, and cunningly but falsely represented to her, that she could not marry Cunningham, until after she had satisfied her judgment against him. It is said, however, by appellant's attorney, that Cunningham's promise, although false, was binding on him, and, hence, that it was a sufficient consideration for appellee's entry of satisfaction of her judgment. We hold, however, that such a false, spurious and counterfeit promise, as Cunningham's promise is shown, by the averments of appellee's complaint, to have been, was no consideration whatever for the satisfaction of appellee's judgment. If Cunningham had paid appellee the amount of her judgment in counterfeit money, and if, upon the receipt of such money, she had entered satisfaction of her judgment, on the order book of the court; surely, the appellee, on the discovery of the character of the money, could have obtained a judgment, in a suit for that purpose, vacating and setting aside such entry of satisfaction. And if such entry of satisfaction was obtained by a false and counterfeit promise of marriage, instead of by the use of counterfeit money, we know of no good reason why the court should not, in a suit for that purpose, vacate and set aside such entry of satisfaction.

We are referred, by appellant's counsel, to the case of *Noble v. The State, ex rel. Hines*, 39 Ind. 352, as an authority in point upon appellant's position, that Cunningham's promise to marry the appellee was a sufficient consideration for the satisfaction of her judgment. The case cited

Reish v. Thompson.

differs very widely, in some very material points, from the case at bar. In the first place, in the case cited, the relatrix of the appellee did not appear to have been, and we may reasonably infer that she was not, an infant. In the second place, it appeared, in that case, that the entry of satisfaction was made in consideration, not alone of the false promise of marriage, but, also, of the payment of four hundred dollars in money. And, in the third place, it also appeared, in the case cited, that the relatrix of the appellee had affirmed the contract of marriage, by bringing suit for damages, for an alleged breach of said contract, by the appellant in that case, in which suit she had recovered fifteen hundred dollars damages. We can not regard that case, upon the facts disclosed therein, as any authority in this case. We think that case was correctly decided, but it is obvious, from the opinion, that the decision was based upon the whole case. As before stated, the question of the infancy of the relatrix of the appellee, at the date of the entry of satisfaction, which we regard as a controlling question, did not enter into the decision of the case cited. We hold, in this case, that the arrangement or agreement, entered into between the appellant and Cunningham, on the one side, and the appellee, on the other side, while the appellee was an infant, was one which the appellee, without regard to questions of fraud or want of consideration, had the right to avoid or disaffirm, upon her arrival at lawful age. And it appears from her complaint, that, upon reaching the age of twenty-one years, the appellee did disaffirm the arrangement or agreement, between herself and the appellant and Cunningham, and the entry of satisfaction of her judgment, executed by her as a part of said arrangement or agreement; and that she has brought this action to vacate and set aside said entry of satisfaction.

But, it is insisted by appellant's counsel, that, because the appellee was over the age of eighteen years, when the entry of satisfaction of her judgment was signed by her,

Lucas v. Jarrell, Executor.

and because she might, at that age, lawfully make a valid marriage contract, (1 R. S. 1876, p. 624,) therefore, her entry of satisfaction of her judgment, having been executed in connection with, and in furtherance of, her marriage contract, was valid and binding. But this is a *non sequitur*. On this point, we are referred to the case of *Gavin v. Burton*, 8 Ind. 69. But the case is not in point, for the reason that appellee's entry of satisfaction of her judgment had, in fact, no legitimate connection with, and was not a necessary part of, the alleged contract of marriage; although the appellee was induced, by the false representations of the appellant, to believe that she could not marry Cunningham until after she had satisfied her judgment against him.

We find no such error, in the record of this cause, as the appellant has alleged in his assignment of errors.

The judgment of the court below is affirmed, at the costs of the appellant.

LUCAS v. JARRELL, EXECUTOR.

CONTRACT.—Payment.—Suit for Money Paid for Use of Another.—Evidence.—

In a suit to recover for money alleged to have been paid by the plaintiff, to a third person, for, and at the request of, the defendant, it is immaterial as to whether such third person had or had not a valid claim upon the defendant, for such or any sum of money. But to recover therefor the plaintiff must establish the facts that he had made such payments, and that it was made on the authority of the defendant.

SAME.—Condition.—Performance.—Where A. subscribes a certain sum of money, for a certain purpose, to be paid, on a certain condition, to B., who is to procure, therewith, a certain writing for A.; and B., without the express request of A., advances such sum, and procures such writing for A., and then institutes suit for such sum, against A., the latter may introduce evidence that such condition has never been performed; but, in the absence of proof of such request, or proof of the performance of such condition, B. can not introduce such writing in evidence.

Lucas v. Jarrell, Executor.

From the Knox Circuit Court.

G. G. Reily and *W. C. Johnson*, for appellant.

PERKINS, J.—Appellant sought to recover from appellee, executor of the estate of James M. Jarrell, deceased, twenty dollars, which appellant alleges he paid for said James M., in his lifetime, at his request, in discharge of a subscription, made by said James M., of the above named sum, toward the building of a school-house.

Defendant answered in three paragraphs.

1. General denial.
2. The statute of limitations.
3. That the alleged subscription was made upon the condition, that the school-house should be a building twenty-four by thirty feet.

Reply in denial.

Trial by the court. Judgment for the defendant. Motion for a new trial denied.

The evidence is in the record, and whether the court erred, in finding for the defendant upon it, is the only question in the cause.

This suit is based on the asserted facts that the appellant paid twenty dollars for James M. Jarrell, deceased, at his request, in discharge of a subscription, by said deceased, toward the building of a school-house. Does the evidence establish such a cause of action? To do so, it must establish two facts, viz., the payment of the money, and authority from Jarrell to make the payment for him.

The evidence is as follows:

Elijah Shake testified that he knew deceased; that, in the year 1866, a meeting of some ten or twelve persons was held in the old school-house, in the south part of Sullivan county, close to the Knox county line, to determine how a new school-house might be built. The deceased was there, and took part in the proceedings. It was stated in the meeting, that all the money required to build the house, except one hundred and fifty dollars, had

Lucas v. Jarrell, Executor.

to be raised by subscription. The school trustee was to furnish one hundred and fifty dollars out of the public funds; each man stated how much he would give; the decedent said he would pay twenty dollars; the money subscribed was to be paid to a committee appointed to build the house, when the house was completed. The committee consisted of Reed Lucas, Francis Harvey and Elijah Shake. The house was built. Appellant paid for it, except the brick, which the witness, Shake, paid for. Did not know that deceased, Jarrell, ever paid anything. The house was all paid for in November, 1867. Those agreeing to pay wrote down the amount on a piece of paper. The paper contained no terms or conditions of subscription, and no agreement to pay, but simply a list of amounts; thought Jarrell wrote his own name and amount; the house was built twenty by thirty feet.

Francis Harvey testified that he was at the meeting referred to; deceased was present and agreed to pay twenty dollars, toward building the house; no time was fixed for building the house or paying the money; we, the committee, put the papers into the hands of Lucas; nothing was said at the meeting as to who should collect or pay out the money; witness told Lucas, near the time the meeting was held, to take charge of all the papers and the money; Lucas advanced the money, and collected part of the subscriptions; never heard deceased say anything about paying his part; at the meeting heard deceased say he was good for twenty dollars; saw him write his name to a paper; did not remember that any one was named to receive subscriptions; Lucas did the paying for the building; could not say that Jarrell agreed to pay to any certain person; the committee was chosen by a vote of the meeting.

Reuben Gilmore was township trustee; house was built in 1867; he was at the meeting spoken of; the subscriptions were to be paid to the building committee, and he, witness, was to give each subscriber a receipt for the

Lucas v. Jarrell, Executor.

amount he paid, on his special school tax; Lucas paid him twenty dollars, and took a receipt on special school tax of deceased, Jarrell; Jarrell stated to the meeting that he would pay twenty dollars toward the building of the house, if it should be built of brick, twenty-four feet by thirty; the house was built twenty feet by thirty; its size was reduced for want of funds; he, the trustee, took no charge of the house till it was built.

The paper containing the list of names of contributors was given in evidence, but the receipt given by the trustee, on Jarrell's school tax, to Lucas, was excluded, and this was all the evidence given in the cause.

This was not a suit upon the subscription of the deceased, Jarrell. It is, therefore, immaterial whether that subscription was binding or not, was conditional or not, and, if conditional, whether the condition had been fulfilled or not. If he requested Lucas to pay his subscription for him, and Lucas, in pursuance of that request, did pay it, Lucas could recover, in this action, for money paid, without regard to the validity of the subscription. No express request was proved; and if the subscription was conditional, and the condition had not been complied with, the facts would be properly admissible in evidence, as tending to repel an inference that the decedent had requested appellant to pay his subscription for him.

And as to the admission in evidence of the tax receipt of the township trustee, the court did right in excluding it till it was shown that Jarrell had authorized Lucas to pay his subscription. This fact not having been shown to exist, the court did not err in excluding the receipt. And, if it did exist, the receipt would only be evidence tending to prove that he had paid the subscription. As we have said, the appellant had to establish two facts, to enable him to recover in this case, viz., that he was authorized by Jarrell to pay the subscription for him, and that he had paid it. We can not say that the evidence establishes either of these facts. We need say no more

Hill *et al.* v. Gust, by his next friend, Gust.

upon the evidence, as to the first of them. As to the second, the evidence is not clear that he paid this twenty dollars on the building of the house. It is proved that the house was built and paid for; but how much the house cost is nowhere stated. Gilmore, the township trustee, states that Lucas paid him twenty dollars, but he also says, in effect, that he had nothing to do with the building of the house. He was to pay one hundred and fifty dollars, when the house was completed by the citizens who undertook to erect it. We can not say the court erred in its finding and judgment in the cause.

Affirmed, with costs.

HILL ET AL. v. GUST, BY HIS NEXT FRIEND, GUST.

55	45
184	472
55	45
1171	404

MASTER AND SERVANT.—Negligence.—Hazardous Employment.—In an action by an employee, against his employer, to recover damages for injuries suffered by the former, whilst in the employment of the latter, one paragraph of the complaint alleged, that the defendant, being a contractor engaged in the construction of a railroad, employed the plaintiff, a minor, of the age of but fifteen years, to assist in certain non-hazardous work; but, that the defendant, without giving to the plaintiff sufficient caution, warning or instruction, placed the latter in control of a wild, fractious and ungovernable horse, in a narrow, unsafe and dangerous space between two trains of cars, moved by steam-power in opposite directions, upon a high embankment; and that the plaintiff, whilst exercising due care and engaged in such hazardous employment, was thrown beneath and injured by one of said trains of cars.

Held, on demurrer for want of sufficient facts, that the paragraph was sufficient.

SAME.—Contributory Negligence.—Duty of Employer.—Where an employer places an employee of tender years, at work, in a dangerous place, the former is bound to give to the latter due caution and instruction. And if the employee, whilst so employed, be injured, the fact that he could, by the use of his eyesight, have seen that such place was dangerous, is not sufficient evidence to hold such employee accountable for contributory negligence in causing such injury:—the question of negligence being one for the jury to determine from all the facts.

Hill *et al.* v. Gust, by his next friend, Gust.

PRACTICE.—Pleading.—It is not error to sustain a demurrer to a paragraph of a pleading, amounting only to an argumentative denial.

SAME.—Evidence.—Impeaching Question.—A question asked a witness, for the purpose of laying the ground to impeach him by evidence that he has made statements, out of court, different from testimony he has given as such witness, must clearly state the time when, the place where, and the person to whom the statements in question were made.

SAME.—Supreme Court.—Weight of Evidence.—On appeal, the Supreme Court will not disturb the verdict of a jury upon the mere weight of evidence.

From the St. Joseph Circuit Court.

J. Van Arman, M. K. Farrand and A. Anderson, for appellants.

L. A. Cole and W. H. Calkins, for appellee.

BUSKIRK, J.—This was an action, by the appellee, against the appellants, as contractors in the construction of the Chicago and Canada Southern Railroad, to recover damages from them for their alleged careless, negligent and wrongful acts, whereby the appellee lost one of his legs, and was otherwise permanently disabled.

The action was commenced in the Laporte circuit court, and the same changed to the St. Joseph circuit court. There have been two trials of the cause. The first was had upon a complaint containing but one paragraph, which resulted in a verdict for the appellee, in the sum of three thousand five hundred dollars. A new trial was granted. Before the second trial, the appellee, upon leave granted, filed a second paragraph. The second trial resulted in a verdict and judgment, in favor of appellee, in the sum of four thousand dollars.

The first paragraph charges, in substance, that the appellee was an infant of the age of sixteen years, at the time of bringing this action. That he was employed by the appellants to do and perform a certain kind of work, viz., to fasten chains to cars whilst standing still, which work was not hazardous. That whilst his employment for that work was running, he was compelled, by the ap-

Hill *et al.* v. Gust, by his next friend, Gust.

pellants, to enter upon other work, viz., to work and manage a horse, in a space between two trains of cars, on a high embankment, and this whilst the trains were in motion. That this latter was much more hazardous than the former, and he went upon said work by the orders of the appellants, which act upon their part was a gross and wanton act of carelessness; and, without fault on the part of the appellee, he was injured by being thrown under the cars, causing the amputation of one leg, and the mangling of the other.

The second substantially charges, that, at the time the appellee was employed by the appellants, he was of tender years—aged fifteen—and was imprudently, negligently and carelessly set to work, in an unsuitable, unsafe and dangerous place, by the appellants, without giving him sufficient caution, warning or instruction; which place was in space about five feet wide, between two trains of cars, which trains of cars were constantly moving in opposite directions, and there placed him in charge of a horse which was wild, fractious and unused to the business. That the two tracks were made on a high embankment, and the cars were operated by steam-power. That, whilst the appellee was using due caution, he was thrown down, his legs drawn beneath the iron wheels of the cars, and crushed, causing one of them to be amputated. Judgment was asked for ten thousand dollars.

There was no demurrer to the first paragraph, and no motion in arrest of judgment in the court below; nor is it assigned for error, in this court, that such paragraph does not contain facts sufficient to constitute a cause of action. Hence, no question is presented in reference to its sufficiency. Buskirk Prac.

The errors assigned call in question the action of the court, in overruling a demurrer to the second paragraph of the complaint, in sustaining a demurrer to the second paragraph of the answer, and in overruling a motion for a new trial.

Hill *et al.* v. Gust, by his next friend, Gust.

It is conceded by counsel for appellants, in their brief, that the second paragraph of the answer only amounted to an argumentative denial. There was, therefore, no error in sustaining a demurrer thereto, and this assignment of error will not be further noticed.

We proceed to inquire whether the court erred, in sustaining a demurrer to the second paragraph of the complaint.

The paragraph in question is, in principle and substance, the same as that in *Coombs v. New Bedford Cordage Company*, 102 Mass. 572, the syllabus of which case is as follows:

"The fact that, very near where a workman is voluntarily employed in a manufactory, machinery not connected with his work is in motion, the dangerous nature of which is visible and constant, is not conclusive that he has taken on himself the risk of being injured by it, in modification of the implied contract of his employer to provide for him a reasonably safe place in which to do his work; and if, through inattention to the danger, he meets with such an injury while doing his work, and sues his employer therefor, the questions whether he met with it with due care on his own part, and by reason of the neglect of his employer to give him suitable notice of the danger, are for the jury; and the facts of his youth and inexperience, and the directions previously given to him by agents of the employer about the manner of doing the work, are to be considered upon the question of due notice; * * *.

"Evidence that a boy less than fourteen years old and unacquainted with machinery, after being employed in a cordage factory only one day, * * * and never having been in a similar employment before, was set to work by his employer in a room where the noise was two or three times as loud as in railroad cars, * * * and his duty was to break off the ribbon of hemp at stated times by taking it in both his hands and drawing them apart in a manner in which he had been instructed;

Hill *et al.* v. Gust, by his next friend, Gust.

that by the side of this machine * a similar machine in motion, the gearing of which was unguarded but was in plain view, was situated by the side and somewhat in the rear of the place where he would properly stand in doing his work, and so situated that in drawing his hands apart to break off the hemp his left hand would be brought very near to it; that no one pointed out this gearing to him, or cautioned him in regard to it; and that, while standing in his proper place, attending to his work and breaking off the hemp in the manner described, his hand was caught in this gearing and injured; will warrant a jury in finding that he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the the gearing or manifestly incapable of performing the work there with safety, and that his employer was guilty of negligence in setting him to work in that place without proper and reasonable precautions that he should be so informed and instructed in regard to his work there, and the danger to which he would be exposed, as to enable him, with proper care and attention on his part, to avoid that danger."

This exposition of the law is based upon the theory that an employer is bound, under the law, to give a person of tender years, whom he employs, due caution, explanation and instruction, when he sets him to work in a dangerous and hazardous place. That the mere fact that he could have seen that such place was dangerous and hazardous, by exercising his faculty of sight, is not, of itself, sufficient evidence to hold an employee accountable for contributory negligence; but that it is a question for the jury to determine from all the facts.

In the above case the English and American authorities were fully reviewed, and, in our judgment, support the ruling. We cite the following cases as supporting such ruling: *Cayzer v. Taylor*, 10 Gray, 274; *Seaver v. Boston and Maine Railroad*, 14 Gray, 466; *Snow v. Housa-*

Hill *et al.* v. Gust, by his next friend, Gust.

tonic R. R. Co., 8 Allen, 441; *Gilman v. Eastern Railroad Corporation*, 10 Allen, 233; *Gilman v. Eastern Railroad Corporation*, 13 Allen, 433; *Reed v. The Inhabitants of Northfield*, 13 Pick. 94; *Whitaker v. The Inhabitants of West Boylston*, 97 Mass. 273; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Denny v. Williams*, 5 Allen, 1; *Forsyth v. Hooper*, 11 Allen, 419; *Banfield v. Whipple*, 14 Allen, 13; *Laber v. Cooper*, 7 Wal. 565; *Lovett v. Salem and South Danvers R. R. Co.*, 9 Allen, 557; *Blake v. Sawin*, 10 Allen, 340; *Carter v. Towne*, 98 Mass. 567; *Fogg v. The Inhabitants of Nahant*, 98 Mass. 578; *Gaynor v. Old Colony and Newport Railway Co.*, 100 Mass. 208; *Birge v. Gardner*, 19 Conn. 507; *Johnson v. The Hudson River R. R. Co.*, 20 N. Y. 65; *Wolfkiel v. The Sixth Avenue R. R. Co.*, 38 N. Y. 49; *Mangam v. The Brooklyn R. R. Co.*, 38 N. Y. 455; *Jetter v. New York and Harlem R. R. Co.*, 2 Keyes, 154; *Castle v. Duryee*, 2 Keyes, 169; *Cook v. New York Central R. R. Co.*, 3 Keyes, 476; *Smith v. O' Connor*, 48 Pa. State, 218; *North Penn. R. Co. v. Mahoney*, 57 Pa. State, 187; *Kerr v. Forgue*, 54 Ill. 482; *Davies v. England*, 10 Jurist, (N. S.) 1235; S. C. 33 L. J., (N. S.) Q. B., 321; *Coleman v. Southeastern Railway Co.*, 4 H. & C. 699; *Grizzle v. Frost*, 3 Fost. & Finl. 622; *O'Byrne v. Burn*, 16 Court of Session Cases, (2d series) 1025; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300.

There are other adjudged cases, in England and in this country, which hold otherwise, but it is believed that the decided weight of authority supports the views hereinbefore expressed.

In our opinion, the court committed no error, in overruling the demurrer to the second paragraph of the complaint.

We proceed to the examination of the third and last assignment of error, which is based upon the refusal of the court to grant a new trial.

It is claimed that the court erred, in excluding two questions which were asked Mr. John Cuskey, a witness pro-

Hill *et al.* v. Gust, by his next friend, Gust.

duced by the appellee, who, among other things, had testified as follows :

“I told McKechney I would have to quit, as I did not like to work there on the dump, driving the mule, because I considered it was a dangerous place, and that I did not like to work there. I told McKechney this, in the forenoon of the first day that I drove the mule on the dump ; he asked me to continue on working, and that he would try to find a man to take my place at noon. I told him that I would not work there in the afternoon. He then said that he would not beg men, and pay them besides, to work for him. I worked one hour in the afternoon and then quit. When I was there the mule was caught several times, once falling upon me in the mud.”

For the purpose of impeaching such witness, by proving that he had made statements, out of court, different from those he had testified to, the following questions were asked him upon his cross-examination :

“Did you not state to Mr. Hill, one of the defendants, on the day you quit work on the dump, that the reason why you quit work was, that the foreman called you a son of a bitch ?

“Did you not, on the occasion of leaving the employment of the defendants, tell them, the defendants, that you left because the foreman of the defendants called you a son of a bitch ?”

In laying the foundation for the impeachment of a witness, upon the ground that he had made statements, out of court, different from those testified to, the time when, the *place where*, and the person to whom such statements were made should be clearly stated. The above questions omitted the place where such statements were made, and for this cause, alone, the questions were properly excluded. We do not deem it necessary to consider other objections, that are urged to the competency and materiality of such questions and the answers sought to be elicited.

It is next claimed, that the verdict is not sustained by

Hays v. Ford et al.

the evidence, for the reason that it appears therefrom that the appellee was not in the employment of the appellants, at the time when he was injured, but was in the employment of one Slocum. This was the principal question of fact in controversy in the court below. The evidence covers over three hundred pages of the record, all of which has been carefully read and thoughtfully considered. Upon the point stated, a large number of witnesses testified. There is a plain and irreconcilable conflict in the evidence. Evidence, tending to impeach several of the witnesses who testified in reference to such point, was given. The evidence bearing on such point is quite fully and ably reviewed in the very careful and exhaustive briefs filed by counsel, and the most that is claimed by counsel for appellants is, that, upon such point, the evidence decidedly preponderates in their favor. This depends upon which class of witnesses was entitled to the greatest weight, a question which belongs exclusively to the jury, and we will not invade their province and override their decision. This is one of the cases where we are absolutely prohibited, by long usage and propriety, from disturbing the verdict of a jury.

There is no error in the record.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

HAYS v. FORD ET AL.

UNITED STATES DISTRICT COURTS.—*Judgments of.*—*How Attacked Collaterally.*
—*Jurisdiction.*—*Presumption.*—Where a judgment, rendered by a district court of the United States, not showing upon its face a lack of jurisdiction of such court, over the parties to or subject-matter of the cause so adjudicated, comes in question, collaterally, in an action in a court of this State, it will be presumed, until the contrary is affirmatively shown by the plea, that such district court had such jurisdiction.

Hays v. Ford et al.

BANKRUPTCY.—Discharge of Bankrupt.—Contribution.—Injunction.—Where a judgment has been rendered upon a promissory note, against the principal maker thereof, and his sureties, as such, and, subsequent to the payment of such judgment by one of such sureties, the other is adjudged, and discharged as, a bankrupt, in a proceeding in a district court of the United States, the claim of such paying surety, upon the bankrupt surety, for contribution, is not one exempted by the bankrupt law of the United States from, but is included in, the operation of such discharge; and such paying surety and an officer holding an execution on such judgment, for the benefit of such paying surety, may be enjoined from selling the property of such bankrupt, on such execution.

SAME.—Tort.—A judgment for damages for a tort, rendered against a person prior to the commencement of proceedings against him, wherein he is finally discharged as a bankrupt, is embraced in such discharge.

SAME.—Trespass.—Officer.—Where, upon a judgment rendered against a duly discharged bankrupt, before such discharge, the creditor subsequently causes a writ to be issued to, and the goods of such bankrupt seized thereon by, the proper officer, the creditor is liable to such bankrupt, *ab initio*, as a trespasser, whether he knew of the discharge of such bankrupt or not, but such officer will be protected by such writ, if it be regular upon its face.

SAME.—Pleading.—Evidence.—Discharge of Bankrupt as a Defence to Indebtedness.—How Pleaded and Proved.—Where, to avoid the payment of a debt due from him to another, before his discharge as a bankrupt, the latter undertakes to avail himself of such discharge, it is only necessary for him to plead such discharge by a general averment thereof; and a certified copy of the judgment of the court decreeing such discharge, under the hand of the judge thereof, and authenticated by its seal, is conclusive evidence thereof.

From the Randolph Circuit Court.

C. Ballenger, D. M. Bradbury, J. E. Neff, J. S. Engle, J. B. Julian and J. F. Julian, for appellant.

E. L. Watson and L. J. Monks, for appellees.

PERKINS, J.—At the June term, 1867, James Moorman recovered a judgment, on a promissory note, in the Randolph Circuit Court, in this State, against the appellant, Hays, Henry Jacobs, Benjamin S. Evans, John Lindsey, Philip Barger, Robert B. Cowgill and John A. Jones, for the sum of two thousand and nineteen dollars and thirty-three cents, and costs, in which judgment said Jacobs, Evans and Lindsey were principals, and said appellant, Barger, Cowgill and Jones were sureties.

Hays v. Ford et al.

On the 28th of October, 1867, Barger, Cowgill and Jones paid the judgment to Moorman.

On the 8th day of September, 1868, appellant, Hays, was discharged as a bankrupt.

In 1873, said Barger, Cowgill and Jones procured the issuance of an execution on said judgment, for their benefit, against the appellant, Hays, and placed it in the hands of Ford, the appellee, sheriff of said county, to be levied upon the goods of appellant, whereupon appellant instituted this suit for an injunction, and, in his complaint, averred, "That heretofore, to wit, on the 8th day of September, 1868, in and by the order, judgment and decree of the United States District Court of Indiana, the said plaintiff was fully discharged from the payment of all his debts, provable under the general bankrupt law of the United States, a copy of which discharge is filed herewith, and made part hereof, which reads thus:

"United States of America, District of Indiana. In the matter of Benjamin Hays, Bankrupt. No. 622. Whereas, Benjamin Hays has been duly adjudged a bankrupt, under the act of Congress, establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court, that said Benjamin Hays be forever discharged from all debts and claims, which, by said act, are made provable against his estate, and which existed on the 4th day of May, 1868, on which day the petition for adjudication was filed by him; excepting such debts, if any, as are, by said act, excepted from the operation of a discharge in bankruptcy.'"

To this copy of discharge is attached the official certificate of John D. Howland, clerk of the court, under his hand and the seal of the court, followed by the official certificate of Judge Gresham, that said Howland is the clerk of the court, and that his certificate is in due form of law.

Hays v. Ford et al.

A demurrer was sustained to this complaint, on the ground that it did not contain a cause of action; exception was taken, and final judgment rendered for the defendants. Appeal to this court, and the single alleged error assigned, that the court erred in sustaining the demurrer to the complaint.

The appellees maintain that the ruling on the demurrer was correct, because,

1st. The complaint does not show that the court granting the discharge had jurisdiction.

2d It does not show that the judgment, the collection of which is sought to be enjoined, is not a debt excepted from the operation of a discharge in bankruptcy, by the act of 1867.

3d. It does not set forth a copy of the certificate of discharge, but only a copy of the judgment and decree of discharge.

As to the first ground of objection to the complaint, we think it is invalid.

It is a general rule of law, that, where the record discloses nothing on the point, jurisdiction of domestic courts, of the person and subject-matter, will be presumed in cases where the judgments of those of general jurisdiction come in question collaterally. *Horner v. Doe*, 1 Ind. 130. Judgments of the District Court of the United States are entitled to this presumption.

In *Ruckman v. Cowell*, 1 N. Y. 505, BRONSON, J., in delivering the opinion of the court, says:

“But when the discharge is given in evidence, jurisdiction to grant it should be presumed until the contrary appears. It would be otherwise if the discharge were granted by a commissioner, or a court of strictly inferior jurisdiction. But the district and circuit courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction do not appear upon the proceedings, their judgments and decrees will be reversed on error or appeal.

Hays v. Ford et al.

But they are not nullities, which may be disregarded in a collateral proceeding. *McCormick v. Sullivan*, 10 Wheat. 192. In this respect, the district and circuit courts of the United States stand on the same footing as courts of general jurisdiction; and the authority of such courts is always to be presumed, until the contrary is shown."

If the jurisdiction is presumed till the contrary is shown, it seems very clear that the party on whom is the burden of showing the contrary, should plead the facts evidencing want of jurisdiction. See *Knœffel v. Williams*, 80 Ind. 1. See as to this point, also, sec. 83, 2 R. S. 1876, p. 76. We may observe, parenthetically, that it is decided in *Ruckman v. Cowell*, *supra*, that, where a judgment creditor seizes the goods of a bankrupt, after his discharge, on a judgment rendered before the discharge, he is liable as a trespasser, whether he knew, at the time, of the discharge or not, but that the officer executing the writ will be protected, if the same is regular on its face.

On the second point of objection to the complaint, viz., that it does not negative the fact that the debt was one within the exception contained in the bankrupt act, we think it sufficiently manifest upon the face of the complaint, in the absence of a direct averment, that the debt was one embraced by the discharge of the bankrupt.

The debt consisted of money due upon a judgment. The judgment was rendered upon a promissory note. *Prima facie*, it is not for a fiduciary debt, etc. There are authorities, that, if the judgment had been recovered as damages for a tort, still, having been rendered prior to the commencement of the proceedings in bankruptcy, it would be a debt embraced by the discharge. See Bump on Bankruptcy, note to sec. 5119.

The claim sought to be enforced by the execution, in this case, may be inferred to be that of contribution, by a co-surety, to the payment of the above judgment. If such be the fact, that claim was provable under the pro-

Hays v. Ford *et al.*

ceedings in bankruptcy, and is, therefore, embraced by the discharge. Bump, *supra*, pp. 580, 581, and 740, 741.

The judgment, as we have seen, was rendered in June, 1867, was paid by the surety, in October, 1867, nearly a year prior to the discharge of appellant, as a bankrupt, which occurred in September, 1868. See Bump on Bankruptcy, 92, 93; *Tobias v. Rogers*, 13 N. Y. 59.

Dunn v. Sparks, 1 Ind. 397, is not in point to the question here involved. In that case, no steps had been taken to collect the bill of exchange, and no payment had been made by the co-surety, till after the discharge of a co-surety. This fact is stated in the opinion in *Dunn v. Sparks*, *supra*, as having an important bearing on the decision of the case; while *Tobias v. Rogers*, *supra*, is directly in point.

The third and last objection is, that the complaint does not contain a copy of the certificate of this discharge, but only a copy of the decree of discharge.

The bankrupt law of 1841, sec. 4, contained this provision:

And "such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts," etc.

In *Hayes v. Flowers*, 25 Miss. 169, a case governed by the bankrupt law of 1841, the defendant pleaded the decree of discharge only. A demurrer to this plea was sustained. On appeal, the Supreme Court said:

"The law makes the discharge and certificate the bar to the action. That which constitutes the bar must be pleaded. The certificate is not pleaded in this instance, and, therefore, the plea is defective."

Our present bankrupt law is different. It enacts (see Bump, *supra*:

"Sec. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge

Hays v. Ford et al.

from all his debts, except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

“Sec. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

“District Court of the United States, District of ———.

“Whereas ——— has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title ‘Bankruptcy,’ and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said ——— be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the ——— day of ———, on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

“Given under my hand and the seal of the court at ———, in the said district, this — day of ———, ———.

[SEAL.]

———, Judge.

“Sec. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.”

The two preceding sections, above mentioned, are not the two preceding sections copied in this opinion, but are sections 5117 and 5118 of Bump on Bankruptcy.

It will be seen that, by the present bankrupt act, the discharge is spoken of as one thing, viz., the judgment

Vail, Adm'r, v. Givan *et al.*

and decree of discharge, on the record of the court; and the certificate thereof as a different thing, viz., a copy of the discharge, under the hand of the judge, authenticated by the seal of the court; and the statute enacts that the discharge "may be pleaded by a simple averment that on the day of its date," it was granted, etc., and "that the certificate shall be conclusive evidence," etc.

We think the discharge alone was properly pleaded, in the complaint in this case, as a bar to proceedings on the judgment described in the complaint, and as a ground for enjoining the sale on the execution.

The judgment is reversed, with costs. Cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

VAIL, ADM'R, v. GIVAN ET AL.

DECEDENTS' ESTATES.—*Removal of Administrator.—How Procured.*—An administrator of a decedent's estate, which is in process of settlement, can only be removed upon the verified petition of a person interested in such estate, or of a co-administrator, or of the surety of such administrator, specifying one or more of the causes for such removal, as enacted in sec. 22 of the act concerning "the settlement of decedents' estates," etc., 2 R. S. 1876, p. 491.

SAME.—*Pleading.*—Where a petition for the removal of an administrator of the estate of a decedent is filed by a person claiming an interest in such estate, the petition must show the nature of such interest, by alleging the facts constituting it.

SAME.—Upon the petition of a creditor asking an order upon such administrator to pay off a claim, held by the former, against such estate, but neither asking, nor assigning any statutory reason, for the removal of such administrator, the court can not order his removal, nor appoint a successor for him, in such trust.

From the Dearborn Circuit Court.

H. D. McMullen, G. M. Roberts and F. Adkinson, for appellant.

Vail, Adm'r, v. Givan *et al.*

W. H. Matthews, for appellees.

Howk, J.—In the matter of the estate of Sarah A. Vail, deceased, of which estate Benjamin F. Vail was administrator with the will annexed, pending in the court below for settlement, the appellee, Noah S. Givan, filed his verified petition, addressed to the court, in substance as follows:

The petitioner represented, that, on the — day of —, 1870, the appellant was duly appointed administrator of the estate of said Sarah A. Vail, deceased, and undertook the performance of said trust; that, at the — term, 1871, of the Court of Common Pleas of Dearborn county, Indiana, the petitioner obtained a judgment against said estate for the sum of — dollars and — cents, as shown by Common Pleas order book No. —, page —; that there came to the hands of said administrator a large estate, both real and personal, of the appraised value of — dollars and — cents, a sum sufficient to pay all of the just debts against said estate, had it been properly administered, as shown by the inventories filed in said estate; and that the judgment aforesaid was due and unpaid. Wherefore the petitioner prayed that said administrator might be cited to appear and show cause why he had not paid petitioner's judgment, and that he might be directed to pay said judgment, principal, interest and costs, out of any funds he might have in his hands, as such administrator, and if there was not any money in his hands, as such administrator, to pay debts, that he be directed to sell real estate, belonging to said estate, until he had realized a sum sufficient to pay said judgment, principal, interest and costs; and that he be ordered to apply it to the payment of said judgment, and for all general relief.

This petition was sworn to by the attorney of the petitioner, on November 21st, 1874, and was filed during the November term, 1874, of the court below. And, thereupon, it was ordered by the court below, that the appel-

Vail, Adm'r, v. Givan *et al.*

lant appear before that court, on the second Saturday of that term, and "then and there show cause why he has not paid all the claims that have heretofore been allowed as just and valid against said estate."

On the day appointed, the appellant made a verified report, in writing, showing the condition of his decedent's estate; that he had paid out more moneys, on the decedent's debts, than had come to his hands as such administrator; and that he then had no money in his hands, belonging to said estate. And said report further showed, that said decedent owned, at the time of her death, a large body of land in Pulaski county, Indiana, which was liable to be made assets for the payment of said decedent's debts; that the appellant had made no effort to sell this land, for the reason that it had been and was involved in a lawsuit, and, if sold before this suit was determined, that the land would be sacrificed; that this suit had been decided, by the Pulaski Circuit Court, in favor of said decedent's estate, and was then pending on appeal in this court, and had been submitted, and, he was advised by his counsel, would probably be decided during the then, November, term, 1874, of this court; and, further, that if the said judgment of the Pulaski Circuit Court should be affirmed by this court, he would be able to sell enough of said Pulaski county land, without any difficulty, to pay all the claims against said estate; but that, he believed, it would be a useless expense to attempt to sell any of said land, while said lawsuit was undetermined, as no one would be likely to buy the same.

And the appellee, Noah S. Givan, then filed written objections to the approval of appellant's report; and evidence was then heard, by the court below, on said report and objections, which fully sustained, without any contradiction, the material statements in appellant's report. After the introduction of this evidence, the appellee James S. Bigelow, without the filing of any writing in his behalf, became a party to the record of this proceed-

Vail, Adm'r, v. Givan *et al.*

ing, in some way, but how the record fails to disclose. Upon the evidence introduced, the court below made an order, that, on or before January 2d, 1875, the appellant should make a full and specific report and account of all matters concerning said trust, and of all moneys that had come to his hands, and of all moneys that had been paid out, on account thereof, and that he should pay said claims of the appellees, and that, in default thereof, he should be removed from his trust, without the further order of the court below; and the court sustained the objections to said report, and, instead thereof, required a fuller and more specific report.

On the 2d day of January, 1875, the appellant presented to the court below his verified report and petition, in which he stated, in substance, that, owing to the loss of all his former reports and vouchers, filed by him in the court below, he was not then able to make a full and detailed report of all his doings, as such administrator, as he had been required by the court, on a former day of the term, to do; that said papers had been lost or mislaid, without his fault or negligence, as he did not, at any time during said term, have them in his possession. He therefore asked, that he might have further time granted him to make the report required of him; and he said that he would make said report, as soon as said papers could be found, if they could be found within a reasonable time, and, if they could not be found within a reasonable time, he would make such report to the best of his ability, within such time as the court should order. And as to the claims of the appellees, which appellant had been ordered by the court below to pay by that day, he said that he had no money in his hands, belonging to said estate, and had not had, at the time said order was made, nor at any time since; that he had already paid out, on debts against said estate, which were liens on said decedent's real estate, largely more than the value of the whole personal estate of said decedent, and the whole proceeds of the

Vail, Adm'r, v. Givan *et al.*

sales of said decedent's real estate; and that, since said order was made, requiring him to pay said claims, he had not had time to make any money by the sale of real estate, there being then no personalty, of any value, belonging to said decedent's estate. And the appellant then made the same statements he had made in his first report in this proceeding, in reference to the Pulaski county lands belonging to said decedent's estate. And the appellant prayed the court below to grant him such further reasonable time, to make such detailed report, and to pay said moneys to the appellees, as to the court should seem proper, and he would, in the mean time, use all possible diligence to settle and pay off all claims against said estate.

It does not appear from the record, that the appellees, or either of them, controverted any of the statements of the appellant in this last report and petition, or that either of them made any objection whatever to the granting of the prayer of said petition, by the court below. And having seen and examined said report and petition, the court below, apparently of its own motion, refused to rescind its former order directing the appellant to make a full, true and correct report of his trust, and to pay certain claims of the appellees, and in default thereof that he stand removed, without further order of the court below. And the court then appointed George B. Fitch, as successor to the appellant removed, and said Fitch gave bond to the approval of the court, and took the oath prescribed by law.

All the said proceedings of the court below were duly objected and excepted to by the appellant, and were all embodied in a bill of exceptions, filed during the term, and are all properly before us, for our consideration.

The alleged errors of the court below, assigned by appellant in this court, call in question the sufficiency and legality of the entire proceedings of the lower court, re-

Vail, Adm'r. v. Givan et al.

sulting in the removal of the appellant from his trust, and in the appointment of his successor.

We do not doubt that the proceedings of the court below, in this cause, were prompted solely by a sense of duty; but it seems to us that these proceedings were not authorized by the application of the appellees. The causes for which an administrator may be removed from his trust, and the mode by which his removal may be lawfully procured, and the persons who may make application for his removal, are all accurately defined and pointed out in the 22d section of the statute of this State, providing for the settlement of decedents' estates, etc., approved June 17th, 1852. 2 R. S. 1876, 502. From an examination of that section, it will readily be seen that the removal of an administrator from his trust, in such proceedings as the one at bar, can only be procured upon the written application, to the proper court, verified by oath, of some person interested in the estate, or of his co-administrator, if he has any, or of a surety on his bond, specifying the grounds of complaint for such removal. It is clear, in our opinion, that such written application must show that the applicant, if not a co-administrator, or a surety on the administrator's bond, has a real and existing interest in the decedent's estate,—must allege some one or more of the statutory causes for the removal of the administrator, and must apply for his removal.

In the case now before us, there was no written petition or application, verified by oath, filed by James S. Bigelow, one of the appellees; and the petition of the appellee Noah S. Givan did not show that he had any real interest in the decedent's estate, nor did it allege any one of the statutory causes for the removal of the administrator, nor did it apply or ask for the administrator's removal. The petitioner alleged that he had obtained a judgment against said estate, for ——— dollars and ——— cents; but that allegation was too vague and indefinite, to show that he had any interest in said estate. The evidence on the

Eagan v. Downing et al.

trial, in the court below, did not cure this defective allegation; for the petitioner did not give in evidence, on the trial, any judgment, in his favor, against said estate. No cause whatever was alleged by the petitioner, for the removal of the appellant from his trust, as administrator, nor did the petitioner ask for such removal.

It seems to us, therefore, that the proceedings of the court below, in the removal of the appellant from his trust, and in the appointment of his successor in said trust, were not authorized either by the petition or by the evidence before the court, in this cause, and were, for the reasons given, contrary to law.

So much of the orders of the court below, in this cause, as provided for the removal of, or removed, the appellant from his trust, as administrator, etc., of Sarah A. Vail, deceased, and as appointed George B. Fitch, as appellant's successor in said trust, is hereby reversed, at the costs of the appellees, and the cause is remanded for further proceedings in accordance with this opinion.

EAGAN v. DOWNING ET AL.

55	65
136	148

DEMURRER TO EVIDENCE.—*Fraud.—Fraudulent Conveyance.—Husband and Wife.*—On the trial of an action by a judgment creditor, to set aside certain alleged fraudulent conveyances, made and procured by his debtor, transferring his land to his wife, through a third person, and to subject the same to execution, the evidence on behalf of the plaintiff established that the debtor, prior to his becoming indebted to the plaintiff, had acquired title to the land in question; that, subsequent to the incurring of such debt, such debtor and his wife, by deed, conveyed the land to a third person, who, with his wife, in like manner, conveyed the same to the wife of the debtor; that, though both of said last named conveyances purported to be for a valuable consideration, yet, no consideration for either passed between the parties thereto; that, about two years

Eagan v. Downing et al.

afterward, the plaintiff recovered a judgment against the debtor, for the amount of said debt; and that, an execution on such judgment having been issued to the proper officer, the debtor had then no property subject to execution, and such writ was returned "unsatisfied."

Held, that a demurrer, by the defendant, to such evidence, was properly sustained.

Held, also, that it was necessary, to enable the plaintiff to recover, that he should have established, that, at the time such alleged fraudulent conveyances were made, the debtor did not have sufficient property left to pay his debts, that the debtor had procured the making of such conveyances with the intent to defraud his creditors, that the wife had knowledge of such intent, and that no consideration had passed between her and her husband, for the making of such conveyances.

Held, also, that though, on a demurrer to such evidence, every fair inference deducible therefrom must be taken against the party demurring, yet fraud, in the execution of such conveyances, was not deducible from such evidence and could not be presumed.

SAME.—Conveyance by Husband to Wife.—Where a husband, retaining ample means to pay all his debts, conveys a part of his property to his wife, such conveyance is good as to future creditors, at least.

SAME.—Pleading.—Defence.—To a complaint by a judgment creditor, to set aside an alleged fraudulent conveyance of the lands of his judgment debtor to the wife of the latter, and to subject the same to execution, it is a sufficient answer, by the wife, to allege that such lands had been purchased from a third person, and wholly paid for, by her, through her husband, as her agent, out of her own separate estate, but that, without her knowledge or consent, said lands had been conveyed to her husband, such judgment debtor, who had, on her demand, made the conveyance sought to be set aside.

From the Boone Circuit Court.

S. M. Burke and O. Newell, for appellant.

WORDEN, C. J.—This was an action, by the appellant, against the appellees, the object of which was to set aside certain conveyances, and to subject the property conveyed to the payment of a judgment held by the plaintiff against James M. Downing.

Judgment for defendants.

The complaint alleged, in substance, that on December 25th, 1872, James M. Downing and his wife, Lydia A., without consideration, and with the fraudulent intent to cheat the plaintiff, conveyed certain real estate, described, to John Crigler; and that, on the same day, Crigler and

Eagan v. Downing et al.

his wife, without consideration, and with like intent, conveyed the property to said Lydia A. Downing. That before the conveyance by Downing and wife, the plaintiff, relying upon the solvency of Downing, contracted with him for the sale and delivery to him of a large amount of walnut lumber, which lumber was delivered before the execution of said conveyances.

That afterwards, at the November term of the same court, for the year 1874, the plaintiff obtained judgment for the sum of nine hundred and fifty-three dollars and sixty cents, against Downing, for the balance due him on the lumber, on which an execution was duly returned, on January 19th, 1875, unsatisfied; no goods or chattels, lands or tenements being found on which to levy. That, at the date of the judgment, Downing was wholly and notoriously insolvent.

The parties answered by general denial.

Mrs. Downing answered separately, setting up, in substance, that she had purchased the property with her own means, from Mrs. Rebecca J. Boyd, who, without her knowledge or consent, executed the conveyance thereof to her husband; that, soon after she discovered that the title had been taken in the name of her husband, she demanded and required of him to have the title conveyed to her; that, being advised by counsel that the only way to effect that purpose would be for her and her husband to join in a conveyance to a third person, who could then convey to her, for this purpose she joined her husband in the conveyance to Crigler, and Crigler and his wife then conveyed the property to her; that she had no knowledge of any fraud, nor was she aware of any indebtedness on the part of her husband, to the plaintiff or any one else; that she paid and gave to her husband, as her agent, to pay on the property, over nineteen hundred dollars, of her own separate and independent means.

A demurrer was sustained to this paragraph of answer; but it seems to us to have been good, unless it be open to

Eagan v. Downing et al.

the implication that she had paid only part of the consideration for the land.

The cause was submitted to a jury for trial, but, upon the plaintiff's closing his evidence, the defendants filed a demurrer thereto, and the demurrer was sustained.

Judgment for the defendants.

The ruling on the demurrer to the evidence presents the only question involved here.

The plaintiff introduced a deed for the property in controversy, from Rebecca J. Boyd to James M. Downing, dated April 6th, 1871, purporting to be upon the consideration of twenty-five hundred dollars. Also, a deed from Downing and his wife to Crigler, for the property, dated December 25th, 1872, purporting to be upon the consideration of twenty-seven hundred dollars. Also, a deed from defendants Crigler and wife to Lydia A. Downing, of the same date and upon the same consideration.

He also proved, by Crigler, that the deed from Downing and wife to him was without consideration, as was also the deed from him and his wife to Mrs. Downing.

He proved by the sheriff that he had made diligent search for property, out of which to make Eagan's judgment.

Downing refused to file a schedule.

The plaintiff also gave in evidence the record of his judgment, and testified that he sold Downing a large amount of lumber in 1871, about one hundred thousand feet; delivered the most of it in 1871, the whole of it by June, 1872; Downing paid him one thousand and thirty-two dollars; had to sue him to get the balance, and got judgment for nine hundred and fifty-three dollars and sixty cents; sold the lumber to James M. Downing, by the load; there was never anything but a verbal contract.

The plaintiff also gave in evidence the execution issued upon the judgment, which came into the sheriff's hands January 18th, 1875, and was returned, on the same day,

Eagan v. Downing et al.

endorsed no goods or chattels, lands or tenements on which to levy. This was all the evidence.

The appellant insists that the case was entirely made out by the evidence. We have no brief for the appellee, and are not advised in what respect it was claimed or was supposed to have been lacking, in the court below.

We may remark, that, on a demurrer to evidence, every thing will be taken against the party demurring which the evidence tends to prove, including every fair inference to be drawn from the evidence. But another legal proposition should not be lost sight of, viz., that fraud will not be presumed, but it must be proved by the party who alleges it. Fraud in this case will not be deemed to have been established, unless the evidence tends to prove it, or unless it is to be fairly inferred from the evidence.

It is apparent that the deeds from Downing and wife to Crigler, and from Crigler and wife to Mrs. Downing, were resorted to for the purpose of transferring the property from Downing to his wife.

This transaction took place December 25th, 1872. There was no evidence tending to show what property Downing then had. For aught that appears, he may then have had left ample means for the payment of all his debts. A husband may convey to his wife a reasonable amount of his property, leaving ample in his hands for the payment of his debts, and such conveyance, as to future creditors, at least, will be valid. *Brookbank v. Kennard*, 41 Ind. 339; *Sherman v. Hogland*, 54 Ind. 578.

The evidence as to Downing's insolvency related to a period more than two years after the property had been thus transferred to his wife, viz., January 18th, 1875, when the execution was issued and returned.

We, however, do not rest the case solely upon this ground. There are other considerations, quite conclusive of the correctness of the decision below. The evidence does not show the consideration or motive of the transfer

Eagan v. Downing et al.

of the property, thus indirectly made, from Downing to his wife. It may have been purchased, originally, entirely with her means, and the deed taken in the name of her husband, without her consent. In such case, she would be entitled to have it conveyed to her, and the creditors of the husband could not subject it to the payment of their debts.

Again, her husband may have been her *bona fide* debtor, for money of hers previously had and received by him, and the property may have been transferred, in satisfaction of the indebtedness, in good faith and without fraud. Or, she may have had money of her own, which she wished to invest in real estate, and she may have been the *bona fide* purchaser of the property from her husband, for ready money paid in hand.

We do not see as the case stands upon any different ground, in respect to the necessity of proof of the alleged fraudulent character of the transfer, than it would if the conveyance had been made, by Downing and his wife, to a third person. If they had conveyed to a third person, the creditors of Downing, in order to attack the conveyance successfully and subject the land to the payment of their debts, would have to show affirmatively its fraudulent character, as that it was made without consideration, or that the grantor intended thereby to cheat, hinder or delay his creditors, of which the grantee had notice.

Downing conveyed the property, indirectly, to his wife. Eagan, a creditor of Downing, attacks the conveyance on the ground of fraud; but he fails to show any badge or circumstance of fraud. He does not show that the property was not transferred upon a valuable consideration, as between Downing and his wife; nor, if such were the case, that Downing's intent thereby was to defraud his creditors, nor that his wife had notice of such intent. The burthen of proof rested upon the plaintiff to make out his case, including the fraudulent character of the

 Miller v. Shields et al.

transfer of the property. This he failed to do, and the demurrer to his evidence was, therefore, correctly sustained.

The judgment below is affirmed, with costs.

 MILLER v. SHIELDS ET AL.

55	71
130	15.

WILL.—Construction of.—Tenancy for Life.—Reversion.—Where, by the terms of his will, the testator devised his real estate, subject to certain charges thereon, to his widow, during her lifetime, and directed that at her death, it should be sold by his executor, and the proceeds thereof divided, in certain proportions, amongst certain of his children, such widow, on accepting such provision, became the tenant for life of such estate, entitled to all the rights and subject to all the liabilities of such tenancy, except in so far as modified by the terms of such will; and such children became the reversioners of such estate.

TENANT FOR LIFE.—Repairs.—What Bound to Make.—Act of God.—The tenant of an estate for life is bound to keep in repair the improvements which are upon it at the time it comes into his possession, except where the same are destroyed by the act of God.

SAME.—Injunction.—Waste.—Growing Timber.—Where the tenant of an estate for life takes timber growing thereon, for the purpose of replacing an improvement thereon which has been destroyed by the act of God, he is liable to the reversioner in an action for waste, and may be enjoined from its continuance.

SAME.—Where the tenant of an estate for life, out of the profits thereof, has replaced an improvement thereon, which has been destroyed by the act of God, he has no right to reimburse himself for such outlay, by selling or bartering the timber growing thereon; and if he so disposes of such timber he thereby commits waste.

SAME.—The tenant of an estate for life has a right to take, of the timber growing thereon, sufficient to make all necessary repairs which he, as such tenant, is bound to make; but, unless it is clearly the most economical mode of making such repairs, he has no right to exchange it for lumber with which to make such repairs.

SAME.—Defence to Action for Waste.—That the tenant of an estate for life, at his own expense, has made valuable improvements thereon, which he was not bound to make, is no ground of defence or recoupment in an action against him, by the reversioner, for waste in selling the timber growing thereon.

Miller v. Shields et al.

From the Harrison Circuit Court.

G. V. Howk, W. W. Tuley and D. C. Anthony, for appellant.

S. K. Wolfe, for appellees.

PERKINS, J.—Complaint to restrain future waste, and to recover damages for that already committed.

Judgment below for the defendants.

This case is as follows :

Jesse Shields departed this life in 1847, leaving a will, the first item of which reads thus :

“I give and devise to my beloved wife, Catherine Shields, during her natural life, my home farm, upon which I now reside, being the north-east quarter,” etc., (giving the boundaries of the farm) “containing about one hundred and sixty acres, together with all the household furniture, stock, and all other movable property on the same, to be held and enjoyed by her for her support, and that of my unmarried daughters, Rachel Shields, Lydia Helen Shields, Mary Pamilia Shields and Elizabeth Marsh, widow of Jesse C. Marsh, deceased, and her three children by said Marsh, during the time my said daughters may continue to live single; and if any of them should marry, it is my will that they shall receive, out of my estate, the sum of two hundred and fifty dollars, each, that being the portion heretofore advanced to each of my children who have married; upon which they are to relinquish to their mother, and sisters who may remain single, all further benefit of said home farm, and property bequeathed with the same as above. And at the decease of my said wife, it is my wish that the said farm, together with the personal property and stock which may then be upon the same, be sold by my executor upon such terms as he, in his discretion, may deem most advantageous, the proceeds of which shall be equally divided among all my children, with the exception of Margaret

Miller v. Shields et al.

Bean and the daughter of my son, John Shields, neither of whom are to receive any thing more of my estate."

It is not material, in the decision of this cause, to notice any other of the provisions of the will.

The testator, Jesse Shields, as has been stated, died in 1847. It was admitted on the trial that Edward Miller, the plaintiff, "was, by purchase and conveyance from children of decedent, the owner in fee of the undivided three-sevenths part of said home farm, subject to the life-estate of said Catherine Shields."

Catherine Shields, under the above provision of the will of Jesse Shields, became and was tenant for life, with the rights, perhaps a little restricted, of such a tenant, on the one hand, and subject to the duties and liabilities of such a tenant, on the other. One of those duties was to abstain from the commission of waste.

The acts constituting the waste charged in the complaint are the selling of walnut and poplar timber trees, and permitting them to be cut and removed from the farm, by the purchaser, her co-defendant, Windell. The third paragraph of answer, in defence of the acts committed, follows:

"And for further answer to so much of said complaint as seeks to recover damages, said defendant Catherine Shields, for herself alone, says, that it is true, as charged in said complaint, that she is the widow of Jesse Shields, deceased, and is the tenant for her own life of the lands in the plaintiff's complaint described; but she says, that, by natural causes, the houses, barns and other buildings on said farm became very much out of repair, so that, in the year —, it was necessary, for the benefit of the said plaintiff and the other owners of the inheritance, that large expenditures be made for such necessary repairs, and that, in order to save the timber growing on said farm, which, by law, she was entitled to use for such repairs, she purchased, with her own money, a large amount of lumber, timber, boards, shingles and other like mate-

Miller v. Shields et al.

rial, for the repairing of said farm and the buildings and fences thereon, and for the erection of suitable and necessary new buildings and fences on said farm, amounting in value to three or four hundred dollars, all of which was used by her in the said necessary improvements and repairs of said farm, and for the benefit of said inheritance, and that, by reason of said expenditure, the timber on said farm was saved, and said inheritance was benefited, to the amount and value of five hundred dollars, which amount, she asks, may be recouped from any damages said plaintiff and the other owners may show themselves entitled to in said action."

To this paragraph of answer a demurrer was overruled, and exception taken.

Reply in denial. Trial by the court. Judgment, as has been stated, for the defendants.

On the trial, the court permitted the defendant Catherine to prove that she built a new barn, out of the income derived from the farm.

William T. Shields, a witness, testified:

"I know the defendant, my mother, built a new barn on the farm; would estimate it at five hundred dollars; old barn burned by lightning; the new barn was built at her expense, out of the proceeds of the farm; she has re-roofed buildings at an expense of one hundred dollars, out of the proceeds of the farm; barn was built in 1854 or 1855, and was necessary * * * ; she has given the children, seven in number, two hundred dollars, each, out of the income and profits of the farm; Eli Miller owed her one hundred and fifty dollars, or more, of borrowed money, out of the profits and income of the farm, at the time she sold these trees to Windell;" (which was in 1873, eighteen years or more after the building of the barn;) "heard her say that Jonathan Hisey owed her borrowed money, also derived from the farm."

There was other testimony touching the improvements made and paid for out of the income of the farm. The

Miller v. Shields et al.

testimony in reference to the building of the barn was objected to.

The evidence is in the record.

The overruling of the demurrer to the third paragraph of answer is assigned for error, in this court, as is also the overruling of the motion for a new trial.

We will first consider the ruling on the demurrer to the third paragraph of the answer. That paragraph is bad for uncertainty. It consists of a statement of a series of conclusions, arrived at by the party, without giving the court the facts to enable it to judge as to the correctness of the conclusions pleaded. It is assumed that the court will take the conclusions of the pleader as correct. But the rule of law is, that pleadings must state facts, with reasonable definiteness and certainty, to enable the court to draw upon them the legal conclusions. That the paragraph is defective, in this particular, is manifest on perusal. No analysis of it is required.

Whether the paragraph is so defective, in this particular, as to render it bad on demurrer, we need not decide. It is bad, in substance, on another ground. It rests on an erroneous legal basis. It assumes two legal propositions, one of which is false, without exception, and the other of which is only true in exceptional cases, and the paragraph does not state facts bringing this case within the exceptions.

It assumes that a tenant for life may build new buildings in place of those destroyed by the act of God, and may commit waste by taking timber from the farm, with which to erect such new buildings; and that such tenant may exchange timber, growing on the farm, for lumber, with which to make repairs upon buildings, which it is the duty of the tenant to make.

We shall notice these propositions again, as we proceed. We may say here, as to the second one, that the exceptional cases in which it is true, are where it is clearly shown that it is more economical to buy, or exchange,

Miller v. Shields et al.

timber for lumber, than to take the timber from the farm, at the time, which the tenant has a right to take for necessary repairs. But this paragraph of answer does not show what was the condition of the timber upon the farm; whether it was such as would improve by being left, or would be depreciating; whether it was young or old, etc. There are no facts given, enabling the court to judge of the questions of law involved.

On the trial of the cause, the plaintiff objected to the testimony of the defendant, Catherine, tending to prove that she built a new barn on the farm, in place of the one burned by lightning. No specific objection was made to its admission, but as the testimony could only tend to prove an act unauthorized by law, and which, *prima facie*, could create no liability on the part of appellant, perhaps the court would judicially take notice of its inadmissibility, on a general objection; but it is not necessary, in this case, that we decide this point. The overruling of the motion for a new trial brings before us the correctness, or otherwise, of the judgment of the court below, on the merits of the cause. We think the court erred.

This case, as presented on the whole record, is within a narrow compass.

The defendant Catherine, appellee here, became tenant for life of the farm and other property, described in the will above mentioned, for the support of herself and three single daughters, during the time they should remain single, and for the payment to each of them of a small sum of money. The farm and stock were productive. They had enabled the defendant, out of the income from them, to support herself and daughters, pay them the sums of money bequeathed to them, keep the farm in repair, and, in addition, to loan out a handsome surplus. The barn on the premises was burned down by the act of God. It became necessary, for her own convenience, on account of the large amount of stock, consisting of horses, cattle, etc., to rebuild the barn. She did

so out of the surplus income of the farm, over and above what was required for her support, and that of her daughters, and the making of the repairs on the farm. She had enjoyed the use of the barn, when this cause was tried, about twenty years, and, for aught that appears, may be still enjoying the use of it.

And the main question in the case is, has she now, at this late day, under these circumstances, a right to reimburse herself the cost of building that barn, by committing waste upon the inheritance?

The reversioner was not bound, by the law, to rebuild; and, as the barn was destroyed by the act of God, the tenant for life was not bound to rebuild it. She was bound to keep in repair the buildings, fences, etc., on the estate when it came to her possession, with one exception. The exception was where a building, as in this case, should be destroyed, not by the act or carelessness of the tenant, but by the act of God. In such case, the tenant has no right to take timber from the estate, to its injury, to rebuild, on the ground of its compensating the injury by equal benefit, because this would be allowing the tenant to force the reversioner to submit to the judgment and will of the tenant, in a matter touching his estate, which might not be in accordance with his own. The tenant holds by gift, and has no rights to exercise by virtue of a contract.

But, on the second question in the cause, there are some cases which hold, that, for the purpose of making repairs which the tenant is bound to make, and has the right to take timber from the premises to make, the tenant may cut the necessary timber upon the estate, and exchange it for boards, etc., with which to make the repairs, "provided this be shown to be the most economical mode of making the repairs."

Judge Story, "in a hard case," appears to have made the exception to the general rule. *Loomis v. Wilbur*, 5 Mason, 13; *Sarles v. Sarles*, 3 Sand. Ch. 601.

Hedrick et al. v. Hedrick et al.

But, to make improvements which it is not the duty of the tenant to make, he may not commit waste upon the inheritance, and justify it on the ground that the benefit compensates the damage. *Clarke v. Cummings*, 5 Barb. 339; *Sohier v. Eldredge*, 103 Mass. 341, on p. 351; *Smith v. Jewett*, 40 N. H. 530; 1 Washburn on Real Prop., (4th ed.) p. 123; 4 Kent, p. 77; Taylor Landlord and Tenant, sec. 449, *et seq.*

In this case, the barn was built for the convenience of the tenant for life. It was necessary to the proper care and management of her large quantity of stock. It might be regarded as necessary for her support, within the meaning of the will; and, being so, it was strictly proper that she should build it, and strictly right that she should pay for it, out of the income of the farm, but not by committing waste upon it.

The judgment is reversed, with costs. Remanded for further proceedings in accordance with this opinion.

Howk, J., having been of counsel in the above cause, was absent.

HEDRICK ET AL. v. HEDRICK ET AL.

55	78
151	74
55	78
163	484

HIGHWAY.—*Amendment of Petition For.*—*County Commissioners.*—During the pendency of a proceeding, before a county board, to establish a highway, or on appeal therefrom to the circuit court, the petitioners are entitled to amend their petition so as to show to whom each separate tract of land to be affected by the proposed highway severally belongs, upon proof that all of the owners or occupants of such lands have been duly notified of the pendency thereof.

SAME.—*Variance.*—Where all the owners of lands which will be affected by the construction of a proposed highway have been duly notified of the pendency of a petition to establish such highway, but the petition and notice are defective in not averring to whom each separate tract of such lands severally belongs, an amendment of such petition, so as to show such ownership, will not constitute a fatal variance between such petition and notice.

Hedrick *et al.* v. Hedrick *et al.*

SAME—Description of Route Proposed.—The description of the route of a proposed highway, petitioned for, was, “passing over and upon the line dividing the lands of” certain owners, named.

Held, that such description was sufficient, and was equivalent to an averment that such route was over and upon such lands, and along the line dividing them, such line to be the center of the highway, and the owners of the lands, on each side thereof, to give half of the bed of the proposed highway.

From the Morgan Circuit Court.

W. R. Harrison and *W. S. Shirley*, for appellants.

G. W. Grubbs, M. H. Parks, F. P. A. Phelps, S. Claypool and *W. A. Ketcham*, for appellees.

WORDEN, C. J.—The appellants filed a petition, before the board of commissioners of Morgan county, for the laying out of a highway, and such proceedings were had as that the cause came to the circuit court. In the latter court, the appellees moved to dismiss the petition for the following reasons:

“1. That said petition, for said proposed road, is insufficient in this:

“(a). That said petition does not sufficiently describe the beginning, course and terminus, and the location of said road.

“(b). That said petition does not sufficiently describe or indicate the names of the owners and occupants of the lands upon and over which said road passes or is proposed to pass.

“(c). That said petition describes said road as passing over and upon the line dividing the lands of certain owners and occupants, instead of over and upon said lands.

“2. That said notice of said petition is also insufficient, because it describes and follows the description of said road, as set out in said petition, and is insufficient in the manner herein set forth.”

While this motion was pending, the petitioners moved for leave to amend the petition, so as to aver and show

Hedrick *et al.* v. Hedrick *et al.*

that the persons named in the petition as land-owners were, severally, the owners of all the lands, over which the proposed road was to run; and they offered to prove, by competent evidence, that the persons named in the petition and notice as land-owners were, severally, the owners of all the lands over which the proposed road would pass, and that no other person or persons owned or occupied any of the lands, over which the road could be located in accordance with the petition. But the court refused leave to amend the petition, on the ground that, when so amended, it would not agree with the notice given of the intention to file the petition; and refused to hear the proposed evidence, or permit the same to be given, to which rulings the petitioners excepted. The court then sustained the appellees' motion to dismiss the petition, to which the petitioners also excepted.

Error is assigned upon these rulings.

It is claimed by the appellees, that the board of commissioners had no power to authorize the amendment to be made, and, therefore, that the circuit court had none. In this, counsel are, as we think, mistaken. The 9th section of the act of March 7th, 1863, (1 R. S. 1876, p. 351,) provides, that "Such commissioners shall adopt regulations for the transaction of business, and in the trial of causes they shall comply, so far as practicable, with the rules [of] conducting business in the circuit court." In the case of *Little v. Thompson*, 24 Ind. 146, which was a petition for the establishment of a highway, it was held, that, under the provision above quoted, the provisions of the code in relation to the waiver of certain objections, unless taken by demurrer or answer, were made applicable to such case. The provisions of the code in relation to amendments must be also applicable. It seems to be clear that the board of commissioners might have authorized the amendment; and it is clear, therefore, that the circuit court, on appeal, might have given the leave to amend.

It seems to us, also, that the amendment which was

sought was such as ought to have been allowed. The petition assigned to some of the lands, through which it was proposed to run the road, an ownership; but as to some of the lands, no ownership was stated; nor was it stated, in terms, that the persons named owned all the lands through which it was proposed to run the road. But if, in point of fact, the persons named in the petition owned all the lands through which it was proposed to run the road, as was proposed to be shown by the evidence, then all of them were notified, as required by the statute, for the notice followed the petition. If all the persons, through whose lands it was proposed to run the road, were properly notified, the amendment which was sought was more matter of form than substance, and ought to have been allowed. The amendment would not have created any substantial variance between the petition and notice. We think the evidence should have been received, and, if it showed that the persons, named in the petition and notice as land-owners, owned all the lands through which it was proposed to run the road, leave should have been given to amend the petition, as in such case all the parties were properly brought into court by the notice.

We do not find, in the brief of counsel for the appellees, any objection that the beginning, course and termination of the proposed road are not sufficiently stated. The petition, in this respect, seems to be sufficient.

But it is objected that the petition is bad, and was rightly dismissed, because it "describes the proposed highway, in several places, as *running on the line dividing* the lands of certain named proprietors, without averring that it ran upon or over said lands, or what part of said road passed upon each." We think this objection lacks substance. As was said in the case of *Hughes v. Sellers*, 34 Ind. 337, "Literally construed, the petition proposes to do an impossible thing; that is, lay out a highway between the lands of two adjoining proprietors. We

Schlosser *et al.* v. The State, *ex rel.* Ellison.

must understand it as proposing to run the highway through the lands of the persons named, but on the line dividing their lands, so that, according to the statute, each shall give half of the road."

The statute provides, "that where the road is laid out upon the line dividing the land of two individuals, each shall give half of the road." 1 R. S. 1876, p. 531-532, sec. 16. There is no space between the lands of adjoining proprietors, though there is a line. A line, mathematically considered, has no breadth, and it is impossible to run a road upon it without running upon adjoining land. The language of the petition cannot be misunderstood. It means, keeping in view the provision of the statute, that the center line of the road shall be the line dividing the lands of the named proprietors, one-half of the width of the road to be upon the land of each.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

SCHLOSSER ET AL. v. THE STATE, EX REL. ELLISON.

LIQUOR LAW OF 1873.—*Suit on Bond by Wife.—Intoxication of Husband.—Failure to Provide.—Cruelty.*—Where a person who held a license to sell intoxicating liquors, granted under the act of February 27th, 1873, (Acts Reg. Sess. 1873, p. 151,) regulating the sale of such liquors, improperly sold intoxicating liquors to a man who was in the habit of becoming intoxicated, and who, by such sale, became intoxicated, and thereby failed to provide for his wife, and beat and abused her, she, as relatrix, could maintain an action for damages, against such person and his sureties, on the bond executed by him pursuant to the 3d section of such act.

SAME.—Evidence.—On the trial of such suit the evidence must establish that the defendant sold intoxicating liquors to the husband, causing or contributing to his intoxication, whereby the wife was injured in her

Schlosser *et al.* v. The State, *ex rel.* Ellison.

person, property or means of support, and the bond sued upon must be given in evidence.

SAME.—*Intoxicating Liquor.—Beer.*—Where, on the trial of such cause, the evidence showed that “beer,” only, was sold to the husband by the defendant, but did not show what kind of beer it was, nor that it was intoxicating, the plaintiff was not entitled to recover.

SAME.—Where, in such suit upon a liquor dealer’s bond, upon the trial thereof, “it was agreed by the parties that the bond was executed, as set out in the complaint,”

Held, that such agreement did not waive the necessity of offering such bond in evidence.

From the Miami Circuit Court.

J. L. Farrar and J. Farrar, for appellants.

BIDDLE, J.—Andrew Schlosser and George Steinmetz obtained a permit to sell intoxicating liquors, under the act of February 27th, 1873, and gave bond, as the act required, with Jacob Pauley and Andrew Baldner as their sureties. This action is brought upon said bond, by the State, on the relation of Mary J. Ellison, charging the appellants with improperly selling intoxicating liquors to Charles H. Ellison, her husband, whereby he became drunk and neglected to provide for his said wife and family, and by reason of such intoxication beat and maltreated his said wife, the relatrix, etc.

Demurrer to the complaint, upon the ground that it does not allege facts sufficient to constitute a cause of action. Demurrer overruled, and exception reserved.

Answer by general denial.

Trial by jury, and verdict for appellee. The usual motions, rulings and exceptions were had, and the case brought before us upon the questions of law and fact.

The complaint is founded on the 3d section of the act, *supra*, and, according to precedents settled by this court, we think it is sufficient. *Fountain v. Draper*, 49 Ind. 441; *Barnaby v. Wood*, 50 Ind. 405; *English v. Beard*, 51 Ind. 489.

It is urged by the appellants that the evidence does not support the verdict. It is as follows:

Schlosser et al. v. The State, ex rel. Ellison.

James M. Brown testified :

“ I know Charles H. Ellison, husband of plaintiff; was in the habit of becoming intoxicated.”

“ It was agreed by the parties that the bond was executed, as set out in the complaint.”

Mary J. Ellison testified as follows :

“ My name is Mary J. Ellison ; my husband’s name is Charles H. Ellison ; I am plaintiff in this case ; my husband is a drinking man—is in the habit of getting drunk ; he is a drinking man, and spends his money to the injury of his family ; my boy is fifteen years old in January, and my babe is two years old ; our means of getting along are poor ; our clothing is poor ; he would be one week sober, and then two or three weeks drunk ; I think he spent his money at Schlosser’s ; after the 4th of July, I went to Schlosser’s saloon, in Peru, Indiana, and forbid him selling my husband any thing to drink ; he told me he had sold him drinks ; the reason why was, it made him mad if he denied him ; this conversation was about a week after the 4th of July ; he said he knew that he was pretty tight that evening, that he had just gone out of there ; he was there quite often after this ; I did not see him there, but my boy did ; I paid the house rent, twelve dollars per month, for the last four months ; I purchased the provisions for four months, amounting to about seven or eight dollars per month ; my boy got his own clothes, and I got mine and the baby’s clothes ; the clothing would amount to about two dollars per month ; my husband could earn two dollars per day when he worked ; he was not in very good health, but able to work ; his ill health, from the time I gave the notice, to the commencement of this suit, was caused by his drinking, and on account of his being drunk ; he was put in jail and confined fourteen days ; he is now at home ; came home last night ; has been at New Albany, Indiana ; he left here about six weeks since ; left no money to live upon ; after the notice, he put me out of the house ; slapped me and kicked me,

Schlosser et al. v. The State, ex rel. Ellison.

while he was drinking, about every time he would get tight."

Cross-examined by defendants:

"I never saw my husband drink in defendants' saloon, and, of my own knowledge, I do not know that he ever drank a drop there."

Charles Ellison testified:

"I am fifteen years old, in January next; father would get drunk, and be drunk a week or two at a time; I saw my father, Charles H. Ellison, go into defendants' grocery, in Peru, Indiana, since my mother gave the defendants notice, and drink; I was with her when she gave the notice; I think he drank beer; Mr. Steinmetz sold my father the drink; I saw my father drink there several times."

Cross-examined:

"When my father drank I stood so I could see him; I could not tell what he drank, only it looked like beer; there is a partition between the saloon and the grocery; I stood in the grocery part; the door was open, and I could see him drink in the saloon; this was after my mother gave them notice; nobody sold him but Steinmetz, the defendant."

Here the plaintiff rested.

And the defendants, to maintain their side of the issues in this cause, called George Steinmetz, who, being duly sworn, testified as follows:

"My name is George Steinmetz; I am one of the defendants; after Mrs. Ellison gave us notice, we never sold her husband any intoxicating drinks; he afterwards got drunk, and came into our store; we sold him groceries, but never let him have anything to drink."

Cross-examined by plaintiff:

"After the notice given by his wife, Ellison never got any thing to drink, in our house; I was there most of the time; I did go to my meals; possibly he might have got it then; we have a clerk, sometimes; possibly he could

Schlusser et al. v. The State, ex rel. Ellison.

have got it of him, but not of me; nor do I believe he got any there; we were careful."

Here the defendants rested.

This was all the evidence given in the case.

The bond upon which this action is brought is founded upon section 3d of the act cited, and is "conditioned for the payment of any and all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of this act, and conditioned further, that the principals and sureties therein named shall be jointly and severally liable, and shall pay to any person or persons any and all damages, which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of any sale or sales of any intoxicating liquors to any person, by the person receiving such permit or by any of his agents or employees."

To maintain an action under the 12th section of the act, when the wife sues on account of the intoxication of her husband, she is required to establish the following propositions:

1st. The intoxication of her husband, habitual or otherwise.

2d. That she has been injured in person or property, or means of support, in consequence of such intoxication.

3d. That the intoxication, from which the injury resulted, was caused, in whole or in part, by the selling, bartering or giving intoxicating liquors to her husband, by the defendants.

4th. In a suit founded on a bond taken under section 3d, the bond must be introduced to the jury as evidence.

The evidence is extremely weak, in some points necessary to maintain the action. The jury were left merely to an inference as to whether the liquor, sold to the husband by the appellants, was intoxicating or not. There is no evidence that it was intoxicating; and, as some kinds

Simonton v. Thompson.

of beer are not intoxicating, and the character of this beer was not given, the jury could not know, without evidence, that it was intoxicating. The time at which the sale was made is not stated, except that it was after the notice not to sell had been given to the appellants. For any thing the evidence in the record shows, the sale might have been made after the wife had suffered all the injuries she complains of, and even after the commencement of the suit. Nor is it shown that the liquor sold intoxicated the husband; and whether it contributed, in any part, to the injury of which the wife complains, is left wholly to inference. Besides, the defendant Steinmetz, in his testimony, denies the sale entirely. This evidence can not be overlooked, when the only evidence of sale in the case was, that he, and not the other partner, or any agent, employee or any other person, made the sale. But we do not place our judgment upon the mere *weight* of the evidence; in such cases the presumptions must go with the verdict, and every indulgence must be granted by an appellate court to sustain it; but it will not do to sustain a verdict in a case where there is *no* evidence to a point which is necessary to uphold it. Presumptions and indulgences may strengthen evidence, when there is any to strengthen, but they can not supply evidence which is entirely absent from the case.

The judgment is reversed, with costs.

Cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

SIMONTON v. THOMPSON.

REAL ESTATE.—*Alienation Of.—Conveyance.—Monuments.—Measurements.—*

A. owned a quarter section of land, across which, running north and south, at a distance of less than twenty-five rods from the west line thereof, a highway was located. He conveyed to B. a portion of such land, by a

Simonton v. Thompson.

deed describing the portion conveyed as the whole quarter section, "less a strip, twenty-five rods in width, off the east side of said premises; and, also, less a strip, twenty-five rods in width, off the west side of said described quarter section, containing one hundred acres, be the same more or less; expressly reserving a right of way, from the east side of said premises, across said premises, to the highway on the west side of said premises."

Held, that, though thereby including a portion of the strip reserved on the west side of said quarter section, yet, such highway constitutes the western boundary line of the portion conveyed.

SAME.—Where a tract of land, conveyed by deed, is therein described in one way by measurements, and in another and different way by monuments, the latter description must control.

From the Elkhart Circuit Court.

R. M. Johnson and J. D. Osborn, for appellant.

J. H. Baker and J. A. S. Mitchell, for appellee.

PERKINS, J.—Complaint in a suit to recover land. Answer, the general issue. Trial by jury. Verdict for defendant. Motion for a new trial denied. Judgment on the verdict. The evidence is not in the record.

The court instructed the jury as follows:

"The court deems the whole matter at issue, between the parties in this case, to be settled by the deed executed by the plaintiff, to one Cornish, under whom the defendant claims title to the land in controversy, and will, therefore, instruct you upon that point only. By this deed, which the defendant puts in evidence, the plaintiff conveyed certain land to Cornish, who, afterwards, conveyed the same to the defendant. The deed from the plaintiff to Cornish reads as follows:

"By this deed, I, David S. Simonton, and Emily Simonton, the wife of David S. Simonton, of the county of Elkhart, in the State of Indiana, convey and warrant unto James Cornish, of Elkhart county, State of Indiana, the following described piece or parcel of land, situated in the county of Elkhart, in the State of Indiana, to wit, the south-east quarter of section eight, in township thirty-eight, north, range five, east, less a strip, twenty-five rods in width,

Simonton v. Thompson.

off the east side of said described premises, and, also, less a strip, twenty-five rods in width, off the west side of said described quarter section, containing one hundred acres of land, be the same more or less, expressly reserving a right of way from the east side of said premises, across said premises, to the highway on the west side of said premises, for the sum of three thousand dollars. In witness whereof, * * *

“It is a rule of law that the intent of the parties must be ascertained from the deed, and, when so ascertained, that intent must govern as to the land conveyed by the deed. And another rule is, that where monuments and measurements are both referred to in a deed, and there is any conflict between the monuments so referred to and the measurements given in the deed, the monuments are to govern and control the location of the land, in preference to the measurements; and the reason is, that it is quite easy to err in making measurements, but the location of fixed monuments, such as roads and the like, may be definitely ascertained and proved. If the deed from the plaintiff to Cornish had, after describing the land by measurements, stopped there, then the rights of the parties, as to the land conveyed, would have been determined by such measurements; but the deed did not stop there; it went on to say, ‘expressly reserving a right of way from the east side of said premises, across said premises, to the highway on the west side of said premises.’ The evidence tends to show, that, if the measurements mentioned in the deed are to control in the location of the land, there would be a strip of land, about two rods wide, lying along the road, and parallel to the west line of the land so conveyed, and between it and the road, which was not conveyed by the deed, and which the plaintiff now claims in this action. The latter clause in the deed, however, which I have read to you, refers to the road as being the western boundary of the land, and, for the purposes of this action, it must be presumed that the plaintiff

Simonton v. Thompson.

intended to, and did, convey the whole of the land to Cornish, extending west to the road. By this reference in the deed to the road, it became a fixed monument, and it must be held, as between these parties, that the land, as conveyed to Cornish, actually came out to the road, although, by the measurement given in the deed, it would not do so. The court charges you that this deed fixes the road as the western boundary of the land, and you are bound to accept it as the western boundary; and, if the road has not been changed since Cornish went into possession under his deed, the defendant is the owner of the land in controversy, it not being controverted but that the defendant owns all the land purchased by Cornish, of the plaintiff, and described in his deed."

The plaintiff excepted to the giving of the foregoing instruction, and asked the court to give the following:

"The defendant claims, that, by the description of the land and recitals in the deed from the plaintiff to Cornish, the land actually conveyed by said deed must be held to extend to the road, on the west, and that, as between these parties, it must be conclusively presumed that the intent of the parties was to convey all the land, up to the road, and leaving the road as the western boundary thereof; and, on the other hand, it is contended by the plaintiff that the measurements must govern as to the location of the land; and that, according to such measurements, there is a strip of land between its western boundary and the road. The description and recital are as follows:

"The following described piece or parcel of land, situated in the county of Elkhart, in the State of Indiana, to wit, the south-east quarter of section eight, in township thirty-eight, north, range five, east, less a strip, twenty-five rods in width, off the east side of said described premises, and, also, less a strip, twenty-five rods in width, off the west side of said described quarter section, containing one hundred acres of land, be the same more or less, expressly reserving a right of way from the east side of said prem-

Simonton v. Thompson.

ises, across said premises, to the highway on the west side of said premises.'

"The court instructs you on this point, that if, in describing land in a deed, monuments, such as roads or fixed objects, are referred to for the purpose of describing the land, then those monuments will control and determine the location of the lands in preference to the measurements; but if such monuments are merely referred to in the deed for some other purpose, and not for the purpose of a description of the land, then the measurements may control in preference to the monuments. In the deed from the plaintiff to Cornish, the reference to the road, as being on the west side of the land, is made in fixing the extent of the way reserved through the land; and, unless you believe from the evidence that such recital in the deed misled Cornish when he bought the land, and, from that and other facts proved, he was led to believe the land actually came out to the road, then the recital will not govern and control the measurements in this case." Which instruction the court refused to give, and the plaintiff excepted.

The evidence is not in the record, but, in lieu thereof, a statement that parties introduced evidence tending to sustain their respective sides of the issues in the cause.

There were four paragraphs of answer filed, in addition to the general denial. A demurrer was overruled to the second, third and fifth, and sustained as to the fourth; but, as all defences could be given in this case, under the general denial, we have not considered the rulings on the demurrers.

The appellant has furnished the following plat of the ground in controversy, in illustration of the subject:

 Simonton v. Thompson.

 "S. E. $\frac{1}{4}$, Sec. 8, T³p. 38, N., R. 5, E.

"A

L

F

G

B

"SIMONTON DESCRIPTION.

"Beg. 5.78 chs. E. of N. W. cor., S. E. $\frac{1}{4}$, sec. 8, T³p. 38, N., R. 5, E., thence E. .52 chs., thence S. 37.78 chs., thence W. .61 chs., thence to beg.; containing 2.184 acres.

GEO. T. AGER, S. E. C.

"The quarter section is represented by the boundaries A. B. C. D. and E."

The record does not advise us of the ground upon which the court refused the instruction asked by the plaintiff. It may have been because it assumed facts not proved, or admitted. It may have been because the court did not consider the instruction as enunciating the law. Under these circumstances, we shall not further notice it.

We think the deed of the plaintiff to Cornish conveyed to the latter the strip of land in question. This being so,

Simonton v. Thompson.

other questions raised in the cause are unimportant. The deed contains two designations of the western boundary of the land sold; one is, that it is a line twenty-five rods from the western boundary of the quarter section; the other, that it is the highway on the western side of the premises sold. And the question is, which is to govern? The rule of law is, in such cases, that monuments, fixed, natural or artificial objects, cognizable by senses, control distances. The reason of this rule is said to be, and it is certainly a good one, that parties are supposed to inspect land before or at the time of purchase, in which inspection they can easily recognize visible monuments, and thus acquire a definite idea of the boundaries of the land, which they could not acquire by measuring distances with the eye. *The Buffalo, etc., R. Co. v. Stigeler*, 61 N. Y. 348.

Looking, now, to the plat in this opinion, and supposing the parties to be standing in view of the ground, and the grantor to give to the grantee, the following description of the land which he was selling him, "The south-east quarter of section eight, in township thirty-eight, north, range five, east, less a strip, twenty-five rods in width, off the east side of said described premises, and, also, less a strip, twenty-five rods in width, off the west side of said quarter section, containing one hundred acres of land, be the same more or less, expressly reserving a right of way from the east side of said premises, across said premises, to the highway on the west side of said premises," What would the grantee understand to be the west boundary? A reservation is something taken out of the premises conveyed. It became necessary and proper, therefore, in defining the extent of his reservation, for the grantor to re-describe the boundaries of the land conveyed. His reservation, in substance, is this; expressly reserving a right of way from the east boundary of the premises I have conveyed to you, across the said premises, to the highway, which is the west boundary of the said premises. It

Powell v. DeHart.

could be understood to mean nothing else, and it is unreasonable to suppose that the purchaser of this farm would be knowingly purchasing it, less a narrow strip of a few feet, that would cut him off from the highway; and it is the more reasonable supposition that the vendor was only reserving the strip of land that lay upon the west side of it.

The judgment is affirmed, with costs.

POWELL v. DEHART.

REAL ESTATE.—Judicial Sale of.—Redemption of.—Action for Rent by Purchaser at Sheriff's Sale.—Parties.—Where, by virtue of a decree of court against one defendant in an action, his real estate is sold to satisfy a judgment against a codefendant, for the payment of a sum of money, and, the same remaining unredeemed for the year immediately following such sale, it is conveyed, by the proper officer, to the purchaser at such sale, the latter, and not the former, defendant is liable to such purchaser, for the rent thereof for such year.

SAME.—Landlord and Tenant.—A conveyance of the land of a judgment debtor, by virtue of a sale thereof upon an execution or decree, does not create the relation of landlord and tenant, between the person receiving such conveyance and such debtor.

SAME.—Pleading.—Complaint.—Justice of the Peace.—In a suit commenced in the court of a justice of the peace, the complaint is sufficient if it states the cause of action in such manner that the defendant is thereby informed of the nature of the plaintiff's claim, and that a judgment thereon will be a bar to another suit for the same cause, though, if filed as a complaint for the same cause, in an action commenced in the circuit court, it might be insufficient.

From the Marion Circuit Court.

J. S. Tarkington, for appellant.

G. Carter, for appellee.

Howk, J.—This action was commenced by the appellee, as plaintiff, against the appellant, as defendant, before a justice of the peace of Marion county, Indiana.

Powell v. DeHart.

Appellee's complaint alleged, in substance, that by virtue of a decree, issued in a cause wherein appellee was plaintiff, and appellant and others were defendants, to the sheriff of said county, by the clerk of the superior court of said county, which decree was in favor of appellee and against said defendants, said sheriff did, on November 15th, 1873, sell to appellee a certain lot, particularly described, in Indianapolis, Marion county, Indiana, and issued his certificate of said sale to appellee; that at the time of the rendition of said decree, and at the time of said sale, appellant was the owner of said property and in possession thereof, and remained in possession thereof from the day of said sale till July 18th, 1874, on which day he conveyed away his right of redemption in said property; that on December 12th, 1874, the said sheriff, by virtue of said decree and certificate, conveyed said property to appellee, who then owned the same; that the reasonable rents of said premises, from November 15th, 1873, to July 18th, 1874, amounted to two hundred dollars; that the appellant had not paid the same, nor any part thereof, to the appellee, although often requested thereto; and appellee demanded judgment for two hundred dollars, and for all other proper relief.

Appellant demurred to this complaint, for the want of sufficient facts therein to constitute a cause of action. This demurrer was overruled, and the cause was tried by the justice; which trial resulted in a finding and judgment, in favor of appellee and against appellant, for the sum of one hundred and forty-four dollars, from which judgment the appellant duly appealed to the court below.

The appellant refiled his demurrer to appellee's complaint, which demurrer was overruled by the court below, and to this decision appellant excepted. And the cause was then tried by the court, without a jury, and a finding made and judgment rendered, in favor of appellee and against appellant, for the sum of one hundred and forty-four dollars, and costs.

Powell v. DeHart.

On written causes filed, appellant then moved the court below for a new trial, and the motion was overruled, and appellant excepted.

The evidence, on the trial in the court below, is properly in the record.

In this court, the appellant has assigned the following alleged errors:

1st. The overruling of appellant's demurrer to appellee's complaint;

2d. The overruling of appellant's motion for a new trial; and,

3d. That the complaint did not state facts sufficient to constitute a cause of action.

It is well settled law, in this State, that, in suits originating before a justice of the peace, the statement of the plaintiff's cause of action will be sufficient, if it will inform the defendant of the nature of the plaintiff's claim, and be so explicit that a judgment in the suit may be used as a bar to another action for the same cause. *Clark v. Benefiel*, 18 Ind. 405; and *Milholland v. Pence*, 11 Ind. 203.

We think that the complaint in the case at bar, while it would be clearly insufficient in an action commenced in a court of record, did inform the defendant of the nature of the plaintiff's claim, and that the judgment in this suit might be readily used as a bar to another suit for the same cause of action. Therefore, we hold, that the complaint in this action, originating, as it did, before a justice of the peace, was sufficient. This disposes of the first and third alleged errors in this cause.

The second alleged error was the decision of the court below, in overruling appellant's motion for a new trial.

It is very evident, that the appellee founded his right of action against the appellant, in this suit, upon the last clause of the 2d section of the statute of this State for the redemption of real property, or any interest therein, sold on execution or order of sale, etc., approved June

4th, 1861. 2 R. S. 1876, p. 220, note *a*. The clause referred to is in these words:

“The judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits.”

This language is too plain for construction. It clearly imposes a liability, in the event of the non-redemption of lands or lots sold by the sheriff, for their reasonable rents and profits, for the year in which they might have been redeemed, in favor of the purchaser, upon the judgment debtor, and upon no one else. It is not the owner of the equity of redemption, nor the tenant in possession, but it is the judgment debtor, as such, the man who owes the money, whom the statute makes liable to the purchaser, for the reasonable rents and profits of the premises, sold at sheriff's sale, for the year that the purchaser is not entitled to the possession, if the premises are not redeemed in the mode prescribed by law. And where, as in this case, the purchaser at a sheriff's sale of lands or lots brings his action, under the statute, for the recovery of the reasonable rents and profits of the premises purchased, for the year that he was not entitled to the possession thereof, he must bring his action against the judgment debtor, or he can not recover. It is not the relation of landlord and tenant, which creates this liability, for clearly that relation does not exist, during the year in question. But the liability is a *quasi* penalty, in the nature of interest or damages, which the law gives the purchaser, for the year that he is deprived of the use of his money invested in the purchase, and is not entitled to the possession of the property purchased; and, very properly, it seems to us, this penalty is imposed by law upon the man who owes and ought to pay the judgment,—the judgment debtor.

Powell v. DeHart.

In appellant's motion, in the court below, among the causes assigned for a new trial of this cause, were these:

1st. That the finding of the court was not sustained by sufficient evidence; and,

2d. That the finding of the court was contrary to law.

Among the evidence produced by the appellee, on the trial in the court below, was a certified copy of the judgment or decree, mentioned in his complaint. This was necessary and material evidence, which appellee was bound to produce; for without it he could not prove the cause of action stated in his complaint. But this certified copy of the judgment or decree, under which the appellee became the purchaser, and subsequently the owner, of the lot described in his complaint, proved that the appellant was not, but that another man was, the judgment debtor, in said judgment or decree. Upon this evidence, the finding of the court below, in this action, for the reasons already given, should have been for the appellant, the defendant below. And, in our opinion, the court below erred, in overruling appellant's motion for a new trial.

This decision is in strict harmony with the decision of this court, in the case of *Clements et ux. v. Robinson*, 54 Ind. 599, at the present term, where the above cited clause of our redemption act is carefully considered and passed upon.

The judgment is reversed, and the cause remanded, with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

Hayes v. The State.

HAYES v. THE STATE.

CRIMINAL LAW.—Keeping Gaming Apparatus.—The keeping of a gaming apparatus, commonly called a “trick knife,” for the purpose of wagering, winning and gaining money and articles of value thereon, is a misdemeanor, and not a felony.

SAME.—Repeal of Statutes.—Construction of Statutes.—Section 38 of the act of 1852, defining felonies, (2 R. S. 1876, p. 442) so far as it relates to the keeping of gaming apparatus, is repealed, by implication, by the act of March 15th, 1875, (2 R. S. 1876, p. 480) amending the 74th section of the act of 1852, defining misdemeanors.

From the Allen Criminal Circuit Court.

A. Zollars, J. F. Morrison and F. T. Zollars, for appellant.

S. M. Hench, Prosecuting Attorney, for the State.

WORDEN, C. J.—Hayes, the appellant, and two others were jointly indicted for being the keepers of a certain gaming apparatus, commonly called a “trick knife,” for the purpose of wagering, winning and gaining money and articles of value thereon. He was put upon trial separately, the jury returning a verdict of guilty, and that the appellant be imprisoned, in the state-prison, for the period of one year, and that he be disfranchised for a like period. Judgment was rendered accordingly.

The question is raised, whether the acts charged constitute a felony, or only a misdemeanor.

The act of 1852 (see 2 R. S. 1876, p. 442, sec. 38,) makes the offence charged a felony. It provides, that “Any person who shall be the keeper of any gaming apparatus for the purpose of winning or gaining any article of value, * * * shall be deemed a professional gambler, and upon conviction, shall be imprisoned in the State’s prison not less than one year, nor more than five years, and be disfranchised for any determinate period; or may be imprisoned in the county jail not less than three nor more than six months, and disfranchised for any determinate period.”

55	99
139	368

55	99
170	491

Hayes v. The State.

At the same session of the Legislature, but four days later, the act defining misdemeanors and prescribing the punishment thereof was approved; the 74th section of which (see 2 G. & H. p. 477) provided, that,

“Every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffle-board, faro-bank, nine-pin or tenpin alley, or billiard table, for the purpose of wagering any article of value thereon, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.”

In the case of *The State v. Hope*, 15 Ind. 474, the defendant was indicted for keeping billiard tables; and it was held, that, inasmuch as that the latter statute mentioned that kind of tables, the keeping of which for the purpose specified was made a misdemeanor, the latter statute, by implication, repealed the former, so far as it included billiard tables, under the general term “gaming apparatus.”

In *The State v. Thomas*, 50 Ind. 292, the defendant was indicted for keeping a gaming apparatus, called a “wheel of fortune,” and it was held, that, as the misdemeanor act did not mention a “wheel of fortune,” the keeping of it was not made a misdemeanor, but continued a felony, under the statute first above set out.

Thus stood the law when, in 1875, the 74th section of the misdemeanor act was amended so as to read as follows:

“Every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffle-boards, faro-bank, nine-pin alley or billiard table, or any other gaming apparatus, for the purpose of wagering any article of value therein, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.” 2 R. S. 1876, p. 480.

The amendment, after enumerating certain things, makes the keeping of “any other gaming apparatus” for the purpose specified a misdemeanor, punishable by fine,

Gregory v. Schoenell.

to which imprisonment, in the county jail, as we suppose was intended, may be added.

Thus the keeping of any gaming apparatus, for the purpose specified, is made a misdemeanor, instead of a felony.

The two provisions cannot stand together. So much of the act herein first set out as makes it a felony to be the keeper of any gaming apparatus, for the purpose indicated, is impliedly repealed by the amendment of 1875, which makes the offence a misdemeanor only, and punishes it accordingly. See Bishop on Statutory Crimes, sec. 168; Smith on Const. Constr., sec. 776; *United States v. Tynen*, 11 Wal. 88.

The judgment below is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for a return of the prisoner.

GREGORY v. SCHOENELL.

REPLEVIN.—Contract.—Sale.—Rescission.—Fraudulent Representations.—In an action by the vendor, against the vendee, to rescind a contract of sale of personal property, and to recover possession thereof, on account of alleged false and fraudulent representations, as to his solvency, made by the latter, to the former, to induce him to part with such property on the credit of the vendee, the plaintiff must establish the facts, that the alleged representations were made by the vendee; that, at the time they were made, they were false, and that the vendee knew them to be false; that they were such as would deceive a prudent man; that they were believed by the vendor; and that they induced him to part with such property.

SAME.—Where the vendor of personal property is induced to part with his property, on the credit of the vendee, not on account of false and fraudulent representations, made to him by the vendee, but on account of confidence in the vendee, acquired in prior dealings between such parties, such sale is valid, and can not be rescinded, nor such property recovered back, by such vendor, on account of such fraud.

Gregory v. Schoenell.

SAME.—Ratification.—Where, on account of fraud practised by the vendee, a sale of personal property might have been rescinded and possession of the property recovered by the vendor, but the latter, with full knowledge of such fraud, accepts security for the payment of the purchase price of such property and allows such vendee to retain the possession thereof, until it is levied upon by an officer holding a writ against the property of such vendee, the vendor will be deemed to have acquiesced in and ratified such sale.

SAME.—Sale of Property in Possession of Another.—Property of the value of several hundred dollars, which had been levied upon by, and was in the possession of, an officer, under a writ against the property of the owner thereof, was, whilst so held, sold by him to a third person, for the sum of one dollar, but possession thereof was not and could not be given, by such owner, to such purchaser; and the latter thereupon brought suit against the former, to recover the possession of such property.

Held, that such sale was invalid, and such action could not be maintained.

SUPREME COURT.—Practice.—Assignment of Error.—An assignment as error, on appeal to the Supreme Court, of matter which is only cause for a new trial, presents no question for decision.

NEW TRIAL.—Cause For.—“Misconduct of the prevailing party,” “error of law at the trial and excepted to by the defendant,” and “misconduct of the jury,” are too vague and indefinite to constitute grounds for a motion for a new trial of a cause.

From the Huntington Circuit Court.

U. D. Cole and *B. F. Ibach*, for appellant.

W. H. Trammell, *J. W. Gordon*, *T. M. Browne* and *W. C. Lamb*, for appellee.

BIDDLE, J.—Replevin by Frederick Schoenell, against James G. Gregory, to recover the possession of a pair of mules, one set of double harness and one wagon, which, it is alleged, were the property of Schoenell, and were wrongfully taken and unlawfully detained by Gregory.

Demurrer to complaint overruled. Exceptions. Answer. Trial by jury. Verdict for Schoenell. Motion for a new trial overruled. Exceptions. Judgment

The causes assigned for a new trial are:

“1st. Misconduct of the prevailing party;

“2d. That the verdict is not sustained by sufficient evidence, and is contrary to law;

Gregory v. Schoenell.

"2d. Error of law at the trial, and excepted to by the defendant; and,

"4th. Misconduct of the jury."

The first, third and fourth causes are not sufficiently specific; they present no question. This has often been decided. See *Stewart v. Ritterskamp*, 54 Ind. 357, this term. The second cause is well assigned.

In this court, six assignments of error are alleged. The first presents no question; the second, third, fourth and fifth are not matters to be assigned as error. If they contain any thing of substance it would be cause for a new trial. The only proper assignment of error is the sixth, "Overruling appellant's motion for a new trial;" and as no question of law is presented, and no valid cause for a new trial assigned, except the sixth, the only question properly presented for our consideration is the sufficiency of the evidence to sustain the verdict.

It appears by the evidence that, on the 6th of August, 1873, Schoenell sold the property in controversy to Gregory, for five hundred and twenty-five dollars, and took his note for the amount. The next morning after Schoenell sold the property, he went to Gregory, as he, Schoenell, expresses it, "to get the mules back, after I found he was in bad shape." Schoenell wanted security, and proposed to take the note of Booram & Gregory, and surrender Gregory's note. This arrangement was agreed to, and Gregory procured the note of Booram & Gregory to Schoenell, delivered it, and received back his own note, which was cancelled. Gregory kept the property till about the 22d of November, 1873, when it was levied on by the sheriff, as Gregory's property. While the property was in the sheriff's possession, Gregory sold it back to Schoenell for one dollar, and wanted Schoenell to replevy it from the sheriff, which he refused to do, but brought this suit against Gregory. Before suit, Schoenell demanded the property, and tendered back to Gregory the note of Booram & Gregory, which he refused to receive.

Gregory v. Schoenell.

So far, the facts, we believe, are not disputed by either party.

The suit is sought to be maintained, as it seems by the evidence and the briefs of counsel, upon the ground that Gregory obtained the property, upon the original purchase from Schoenell, by fraud, in making false representations; and, therefore, that the contract may be rescinded by tendering back the note taken for the property, and demanding its return, before suit.

The testimony of Schoenell, given in the case, is as follows:

"Am plaintiff; owner of two mules, double set harness, nets, wagon, wood rack, etc., the property involved in this suit; on the 5th or 6th of last August, some one on the street says that Gregory wants to buy a pair of mules; I went to him; he wanted to buy my black team and the whole rig; I told him the price was five hundred and fifty dollars; he had bought Foust's on three months' time, and wanted mine on four months'; I took them up that night; I was sick that day, and my man drove them up, and I went with them; I took the note that night.

"Question by plaintiff. Is that all?

"Answer. Yes.

"I forgot to say that, when I delivered the mules, I asked for security; I told him he was a stranger to me; he said: 'The idea of security! I own the flax mills, and am interested in one at Wabash; I owe some, but have three dollars to one I owe, and have money in bank; I don't want to run short of money; I want to sell either the mill here or the one at Wabash, to make a furniture factory at one place or the other;' said he had offered to trade his property to Morgan, for his store; that he wanted to buy a quarter or half section of land, as an experiment; I went to Gregory to get the mules back, after I learned he was in bad shape; he said he gave a mortgage on them to Booram & Pease, in New York, and would write to them and get it taken off; he said they knew he had not

Gregory v. Schoenell.

paid for them, but he gave it to save me and Mr. Foust; I afterwards, on the 22d day of November, 1873, purchased the mules of Gregory, for one dollar; he had the property about four months; they are not worth as much as when I sold them; damages, one hundred dollars, for use."

Cross-examined by defendant's attorney.

"Question. You said Mr. Gregory was a stranger to you. Had you never had any dealings with him previously to this?

"Answer. Yes; he had bought considerable wood of me.

"Question. Had he ever owed you any money before, how much, and had he always paid you?

"Answer. He had owed me as high as two hundred dollars before, and had always paid me.

"Question. Now, was it not that Gregory had owed you money, and had always paid you, that caused you to give him credit, and not any representations of his, regarding what property he owned?

"Answer. Yes.

"Question. Did you not, after receiving a note signed by Gregory, go and ask him to give you one in the name of Booram & Gregory?

"Answer.. I heard, in the evening, after I had delivered the property and taken the note, that Booram owned most of the flax mills, and next morning I went to Gregory and asked him for a note signed by the firm. He said his boys had mislaid his printed notes, and he would write one and hand it to me. He afterwards gave me one signed by the firm of Booram & Gregory, and I delivered up the one first given."

This is all the testimony given by Schoenell.

Gregory, in his testimony given in the case, denies making any representations whatever about his property, at the time he bought the mules, etc., and denies that

Gregory v. Schoenell.

Schoenell wanted any security on the note, when he sold the property and took the first note.

About the sale, changing the notes, and in other respects, there is no substantial conflict between the statements of the two parties.

The above is all the evidence given in the case, touching the fraud.

It such a case, to establish fraud, and authorize a rescission of the contract for that cause, the representations made must have been such as were calculated to deceive a person of common prudence; they must have been false, and known to be false, at the time, by the person who made them, and the person to whom they were made must have believed them to be true, and relied upon them; and they must have been the inducement which caused him to part with his property. A fraud, by which no one is deceived, is harmless, in law.

It seems to us that several links in the chain of evidence, necessary to support the appellee's cause, are absent. Whether Schoenell believed the representations made to him by Gregory were true does not appear; and whether they were false appears only very faintly; that the representations induced Schoenell to part with his property and give credit to Gregory, does not appear; indeed, the evidence tends strongly to the contrary. It is quite plain that Schoenell gave credit to Gregory because they had dealt together before, and Gregory had always paid him.

In our opinion, the fraud is not proved. We do not put it upon the question of the *weight* of evidence, but upon the ground that, as to some material points necessary to be proved to maintain the case, there is *no* evidence. Besides, the acquiescence in the contract, by Schoenell, during more than four months, and till the property was levied on as the property of Gregory, is very much against his cause.

On another ground:—There is no evidence whatever,

Naltner et al. v. Tappey.

tending to show that the note made by Booram & Gregory to Schoenell, for the property in dispute, is not valid, and the makers able and willing to pay it. Gregory was not bound to receive back the note and rescind the contract, after an acquiescence in the contract so long, by Schoenell, and after certain rights of other parties to the property had intervened.

But the appellee insists that he has a right to hold the property, under his purchase back from appellant for one dollar; but we think not. That sale had no validity. The vendor was not in possession of the property. No delivery was made. The consideration was merely nominal. If Schoenell supposed he was getting a right to the entire property for one dollar, the amount is so inconsiderable, compared with its value, that the contract would bear, upon its face, as against the rights of others in the property, evidence of its own invalidity; and if he supposed that he was purchasing whatever interest Gregory had over the liens upon the property, the act of buying it back would be a recognition of Gregory's title to it, acquired by his original purchase from Schoenell; so, in either event, we think he can not maintain his title under that purchase.

In our opinion, the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs.

Cause remanded, with directions to sustain the motion for a new trial, and for further proceedings.

NALTNER ET AL. v. TAPPEY.

PLEADING.—*Written Agreement.*—*Construction of.*—In construing and giving effect to a written agreement, attached to, and constituting the basis of, a pleading which also alleges the terms of such agreement, in detail, the writing itself, and not such allegations, must be considered.

Naltner *et al.* v. Tappey.

SAME.—*Foreclosure of Mortgage.—Promissory Note.—Extension of Time of Payment.—Collateral Security.—Contract.*—To secure an extension of the time of payment of a debt evidenced by a promissory note secured by a mortgage, a purchaser of the mortgaged property executed to the payee of such note, another promissory note, payable at a time beyond the maturity, and for the amount of the principal and interest, of the former note, with the agreement that such former note and such mortgage should be deposited at a certain bank, there to remain until the maturity of the latter note; and that, upon the payment of the latter note, the payee would deliver up such former note, to said purchaser, and cancel such mortgage. *Held*, that, upon default being made in the payment of such latter note, such payee was entitled to have a judgment upon such former note, against the maker thereof, and to have a judgment of foreclosure of such mortgage, against said, or any subsequent, purchaser.

From the Marion Superior Court.

N. B. Taylor, F. Rand and E. Taylor, for appellants.

W. Morrow, N. Trusler and J. A. Henry, for appellee.

NIBLACK, J.—The complaint in this cause alleged that one Charles Stierle and the appellant Jacob W. Loeper, on the 15th day of December, 1869, executed to the appellee their promissory note for the sum of forty-two hundred and eighty-three dollars and fifty cents, payable in two years, with ten per cent. interest from date, and including attorney fees, and, to secure the payment thereof, on the same day, executed, also, mortgages on certain real estate, and on some personal property pertaining to The Eagle Brass Works, in the city of Indianapolis, and that the appellant Naltner had since become the owner of said real and personal property, subject to said mortgages, and had assumed to pay said note and mortgages.

The prayer of the complaint was for judgment, on the note, against the said Stierle and Loeper, for the foreclosure of the mortgages, and for all other proper relief.

Stierle not having been served with process, the action was dismissed as to him. Loeper made default.

Naltner answered in two paragraphs:

1st. In general denial.

2d. That the note and mortgages sued on were not

Naltner et al. v. Tappey.

wholly due and unpaid, in this, to wit, in consideration that the appellee's said note was not fully secured, on account of the insolvency of the makers thereof, and for the reason that the mortgaged property was encumbered by older mortgages, and that, hence, said mortgages, in the complaint mentioned, did not afford security for more than half the amount of said note; and in further consideration, that Robert C. Sturm would purchase the mortgaged property, and would, on the 15th day of October, 1870, give his note, with Herman Sturm as surety, for the amount of the mortgage debt then due, to wit, four thousand six hundred and forty dollars and forty-five cents, payable in four years, at six per cent. interest, payable annually, the appellant would accept said note for four thousand six hundred and forty dollars and forty-five cents, in payment of the mortgage debt; and the said Robert C. Sturm did thereupon purchase said mortgaged property, and did execute his note to the appellee for that amount, and on said terms, with the said Herman Sturm as his surety, and deliver it to the appellee; and in further consideration, that the said Robert C. Sturm did assume all the debts of the firm of Stierle & Loeper, including the prior mortgages on the mortgaged property, it was agreed that the mortgages and the note sued on were to stand as collateral security for the payment of said note for four thousand six hundred and forty dollars and forty-five cents, and that the said last named note should be the principal debt, and, when paid, should be in full satisfaction of the note and mortgages sued on; and the said Naltner averred that the interest on said note for four thousand six hundred and forty dollars and forty-five cents had been paid, up to the 15th day of October, 1873, and that he had purchased said mortgaged property from the said Robert C. Sturm, and assumed the payment of said note for four thousand six hundred and forty dollars and forty-five cents, and no other debt or greater sum.

Naltner et al. v. Tappey.

And the said Naltner further alleged, that an agreement, covering the terms above specified, between the appellee and the said Robert C. Sturm, was reduced to writing and signed by the appellee, a copy of which was filed with said answer, by the terms of which, said note for four thousand six hundred and forty dollars and forty-five cents became the real debt, and, when paid, was to be in full satisfaction and discharge of the said two mortgages, described in the complaint, and that said Sturm had paid all the other debts of the said Stierle & Loeper, including the said prior mortgages on said mortgaged property. The said Naltner further alleged, that, as to the sum of four thousand six hundred and forty dollars and forty-five cents, with interest from the 15th day of October, 1873, and attorney fees, and costs, he could not gainsay, but as to all the rest and residue of said debt, covered by the note and mortgages sued on, he said, it had been fully paid and satisfied, and the note for four thousand six hundred and forty dollars and forty-five cents substituted therefor.

The copy of the agreement in writing, referred to by Naltner in the foregoing second paragraph of his answer, and filed with it, was as follows:

“In consideration that Robert C. Sturm has purchased all the property and effects of the late firm of Stierle & Loeper, known as The Eagle Brass Works, in the city of Indianapolis, upon a part of which property I now hold a mortgage to secure a note of Stierle & Loeper for four thousand two hundred and eighty-three dollars and fifty cents, dated December 15th, 1869, and due in two years, drawing ten per cent. interest, and in consideration that the said Robert C. Sturm has assumed to pay the liabilities of said firm of Stierle & Loeper, and has given his note, with H. Sturm as security, for the amount of said indebtedness of Stierle & Loeper to me, up to this date, to wit, four thousand six hundred and forty dollars and forty-five cents, payable in four years, at six per cent. interest, to be paid annually, now, therefore, in considera-

Naltner et al. v. Tappey.

tion as aforesaid, I agree to extend the payment on the note and mortgages of Stierle & Loeper, four years from October 15th, 1870. And, upon the payment by the said Robert C. Sturm of his note, extended as aforesaid, I agree and bind myself to deliver up to him the note of Stierle & Loeper, and to cancel said mortgage; and I agree to deposit said Stierle & Loeper's note and mortgages at the First National Bank, at Indianapolis, in said city, to remain there until the said Robert C. Sturm's note becomes due and payable.

L. C. TAPPEY,

"October 15th, 1870.

By Morrow & Trusler."

The appellee demurred to the second paragraph of Naltner's answer, alleging that it did not state facts sufficient to constitute a defence to the complaint.

The court sustained the demurrer, to which Naltner excepted. Naltner having, during the pendency of the demurrer, withdrawn the first paragraph of his answer, and having elected to stand by the second paragraph thereof, notwithstanding the action of the court in sustaining said demurrer, refused to answer further.

The court thereupon found that there was due, on the note sued on, the sum of five thousand eight hundred and thirty-six dollars and forty-six cents, and rendered judgment against the said Loeper for that sum, and also decreed a foreclosure of the two mortgages, described in the complaint, and executed to secure the payment of said note.

That judgment was affirmed, on an appeal to the general term of the court below.

The ruling of the court, in sustaining the demurrer to the second paragraph of Naltner's answer, constitutes the only question presented to us here.

In arriving at a conclusion as to the sufficiency of this paragraph, we must consider the force and effect of the alleged agreement between the appellee and the said Robert C. Sturm, concerning the note and mortgages sued on, and comprising the terms and conditions on

Naltner et al. v Tappey.

which said Sturm became the purchaser of the mortgaged property. The paragraph sets out, somewhat in detail, what was agreed upon by and between the appellee and said Sturm, and then alleges that their agreement was reduced to writing, and signed by the appellee, and files a copy of the agreement, as thus made in writing, with said paragraph. In determining the force and effect of the agreement, we are not to consider what the allegations in the paragraph, concerning it, are, merely, but must look to the terms of it, as thus reduced to writing, and as exhibited by the copy, which is, in legal effect, made a part of the paragraph. It is a well settled principle, that, when a contract or agreement is reduced to writing, it must be accepted and construed as thus written.

As we construe this agreement, the only effect which it had, or was intended to have, on the note and mortgages sued on, was to extend the time of payment considerably beyond the time originally specified in them; that is to say, for four years from the 15th of October, 1870. As this suit was not commenced until the 22d day of October, 1874, more than four years after the date above indicated, the agreement would seem to have already performed its office, as regards the extension of the time of payment.

We are of the opinion that the paragraph was insufficient, and that the court did not err in sustaining the demurrer to it.

The judgment is affirmed, with costs and two per cent. damages.

Bingham v. The Board of Comm'rs of Marion Co.

BINGHAM v. THE BOARD OF COMM'RS OF MARION CO.

113	113
128	200

COUNTY COMMISSIONERS.—*Powers of.*—*Statute Construed.*—*Bridges.*—*Donation to County by Individuals.*—Under section 3d of "An act to provide for the erection and repair of bridges," etc., approved March 3d, 1855, the board of commissioners of a county have the right to receive, and to collect by suit, a subscription of money, in writing, made by an individual, as a donation to such county, to assist in the erection of a bridge over a stream in such county.

SAME.—*Appeal.*—The decision of the board of commissioners of a county, as to whether public convenience demands the erection of a bridge over a stream in such county, is final, and can not be appealed from.

SAME.—*Pleading.*—*Building Bridge on Private Property.*—To an action by the board of commissioners of a county to recover the amount of a subscription of money, made by an individual to such county, as a donation to assist in the erection of a bridge over a stream in such county, it is not sufficient to answer that such board had no power to erect such bridge, because the same was erected upon, and became a part of, the road-bed of a private corporation, and for the use of which, since its erection, such corporation charged and collected toll, and that such bridge connected no highways controlled by such county or any township or road district therein.

SAME.—*Rescission.*—In such action, to an answer averring that such subscription was made without consideration and that, before the erection of such bridge, or the taking of any steps therefor, the defendant had notified the plaintiff that he had rescinded and withdrawn such subscription, a reply was sufficient, which averred that the plaintiff, upon the faith of the defendant's subscription, had incurred great expense in preparing and advertising for proposals for letting, and had let, the contract for the erection of such bridge, which, since such notice of rescission and prior to the bringing of the action, had been erected.

From the Marion Superior Court.

H. W. Harrington, for appellant.

N. B. Taylor, F. Rand and E. Taylor, for appellee.

Howk, J.—In this action, the appellee was plaintiff, and the appellant was defendant, in the court below.

To appellee's original complaint, appellant's demurrer, for the want of sufficient facts therein to constitute a cause of action, was sustained by the court below, in special term. Thereupon, the appellee filed what is

Bingham v. The Board of Comm'rs of Marion Co.

termed the second paragraph of its complaint; but it is really the only complaint properly in the record, and it will be so treated and termed in the consideration of this cause.

In this complaint, the appellee alleged, in substance, that on the 1st day of March, 1874, the public convenience, necessity and travel of Marion county, Indiana, required the building of a bridge across Pleasant Run, where the same crosses the contested Pleasant View and Bethel Gravel Road, south-east of the city of Indianapolis, in said Marion county; that the estimated cost of said bridge, its approaches and abutments, amounted to the sum of five thousand eight hundred dollars, that being the estimated value made by the Marion county engineer; that the appellee was not disposed to appropriate any part of said sum, unless the persons in the neighborhood of said proposed bridge, and those interested in having said bridge built, would subscribe a sum sufficient to build the approaches and abutments to said bridge, and appellee was willing to appropriate enough to build the balance; and thereupon several persons, including the appellant, being in the neighborhood, or interested in having such bridge built, made, executed and delivered to the appellee, under the name and style of "The Commissioners of Marion County, Ind.," the following written agreement to wit:

"INDIANAPOLIS, IND., March 11th, 1874.

"We, the undersigned, hereby subscribe and bind ourselves to pay to The Commissioners of Marion County, Ind., without any relief whatever from valuation or appraisement laws, the amounts set opposite to our names, for the purpose of building and making the necessary abutments and approaches for an iron bridge over Pleasant Run, where the same crosses the contested Pleasant View and Bethel Gravel Road, south-east of the city, when the necessary amount is subscribed. We agree to execute our notes for the amount subscribed, payable 30

Bingham v. The Board of Comm'rs of Marion Co.

days after the contract is let for building the same, if notes are demanded."

(Signed, among others, by)

"J. J. BINGHAM, \$200.00."

The appellee averred, that the estimates were duly made, by the county engineer, of the cost of making the approaches and abutments to said bridge, and said estimates amounted to the sum of two thousand four hundred and seventy-five dollars, and that it will, and actually has, cost that sum of money to build said approaches and abutments to said bridge; that the amount actually subscribed by the parties signing said contract was two thousand four hundred and seventy-five dollars, which was amply sufficient to build said approaches and abutments to said bridge; that on the faith of said subscription, the appellee, on the 17th day of June, 1874, let said contract for the building of the approaches and abutments of said bridge, at and for the price and sum of two thousand four hundred and seventy-five dollars, which was the fair and reasonable value thereof, and at the same time and place the appellee let the contract for the iron work and completing of said bridge, at the sum of four thousand dollars, and said approaches and abutments to said bridge were actually completed before the 8th day of August, 1874, and the bridge partially completed under said contract; and that more than thirty days had elapsed, from the letting of said contract for the building of said approaches and abutments to said bridge and of said bridge, before the institution of this suit, and appellant had due notice thereof, and that no note of any kind had been demanded of appellant for his said subscription; that appellant had failed and refused to pay said subscription, and the same was then due and wholly unpaid. And appellant demanded judgment for five hundred dollars, and all proper relief.

To this complaint, appellant demurred for the want of sufficient facts therein to constitute a cause of action;

Bingham v. The Board of Comm'rs of Marion Co.

which demurrer was overruled by the court below, in special term, and appellant excepted.

The appellant then answered, and said that he signed the said petition and subscription, without any consideration whatever, and as a voluntary aid, only, for the future erection of the stone work, piers, abutments and foundation for a contemplated bridge across Pleasant Run, on the line of the Pleasant View and Bethel Gravel Road, and upon no other or different consideration or purpose whatever; that, before any expenses were incurred, or materials furnished, or liabilities of any kind were incurred, or acts done for, towards or in connection with said work or materials or said objects contemplated in and by said petition and subscription, sued on, by the appellee or any one holding authority so to do,—the appellant rescinded his said subscription and withdrew his said petition, and notified the appellee that he rescinded and withdrew the same, and that he would not be held liable on the said subscription, nor pay the same or any part thereof, and then and there forbade the appellee from incurring any liabilities or being to any expense, on account of said subscription. Wherefore appellant said, the said subscription was void.

To this answer, appellee demurred, upon the ground that it did not state facts sufficient to constitute a defence to the action; which demurrer was overruled, and appellee excepted.

Appellee then replied to appellant's answer, and said, in substance, that, on the 5th day of May, 1874, the subscription paper, set out in the complaint, had been signed by all the parties and persons, whose names are subscribed thereto, with the several amounts thereto attached as their subscriptions, and was, on said 5th day of May, 1874, presented to appellee, and appellee then and there accepted said subscription for the purpose in said subscription expressed, and on the same day ordered the approaches, abutments and bridge to be built, and then

Bingham v. The Board of Comm'rs of Marion Co.

and there ordered plans and specifications for said bridge, abutments and approaches to be prepared, and then and there ordered advertising to be made for bids for doing the work and furnishing the material to build said approaches, abutments and bridge; said bids were received, sealed, up to the 17th day of June, 1874, when said bids or proposals were to be opened and the contracts awarded; that appellee had incurred expenses, which were necessary and proper, in and about procuring the plans, specifications and advertising, previous to the 17th of June, 1874, in at least the sum of five hundred dollars; that on said 17th day of June, 1874, the contract for building said approaches, abutments and bridge was let, and on the same day the bids were opened and the contracts were awarded for the same; and, after they were awarded, to wit, on the 19th of June, 1874, appellant gave appellee notice, in writing, that he would not pay his said subscription, and attempted to withdraw the same, and the appellee refused to let him do so.

And the appellant demurred to this reply, for the alleged insufficiency of the facts therein to constitute a reply to his answer; which demurrer was overruled by the court below, and to this decision appellant excepted.

Appellant then filed a second paragraph of his answer, in which he alleged, in substance, that the contested Pleasant View and Bethel Gravel Road Company was, before and at the time of executing the subscription sued on by appellant and all parties thereto, and ever since has been, a corporation, created under and by virtue of the laws of Indiana, to construct and maintain a gravel road from —, to —, in said county, and to receive and take toll from those using and travelling said road, and, at the time of said subscription and of constructing the bridge, etc., herein named, said corporation had constructed said road and was taking toll thereon from the public, and that the said bridge, abutments and approaches, in the complaint referred to, be and were

Bingham v. The Board of Comm'rs of Marion Co.

erected upon the line of the said gravel road company's road, over a stream called Pleasant Run, and was and then was a part of said corporation's road track and bed and line of road, and said corporation's property, and that the same was to be and was built for the benefit of said gravel road company's road, and for said corporation, and as a part thereof, and was not built over any stream, nor to connect any road or roads that were kept up, worked or controlled by the public, nor by the county, nor by any township or any road district of said county, and that ever since the erection of said bridge, the said gravel road corporation had taken toll for travel over the same, as part of its said road, and said that the appellee had no power by law to let the contract for, nor to build, or to aid in building, said bridge or any part thereof. Wherefore, the appellee ought not to recover.

Appellee demurred to this paragraph of appellant's answer, for the want of sufficient facts therein to constitute a defence to the action; which demurrer was sustained by the court below, in special term, and to this decision appellant excepted.

And the action, being at issue, was tried by the court below, in special term, without a jury; which trial resulted in a finding and judgment by the court, in special term, for the amount of appellant's alleged subscription. From this judgment, there was an appeal to the court below, in general term; and, upon the errors there assigned, the judgment of the court in special term was affirmed; and from this latter judgment an appeal has been taken to this court.

In this court, the appellant has now assigned several alleged errors; only one of which, under the practice of this court, is available to the appellant, for any purpose.

This one available error is, that the court below, in general term, erred in affirming the judgment of the court in special term.

This alleged error brings before us, for review, the de-

Bingham v. The Board of Comm'rs of Marion Co.

cision of the court below, in general term, upon the alleged errors there assigned. These alleged errors were as follows:

"1st. The court erred in overruling appellant's demurrer to the appellee's complaint;

"2d. The court erred in sustaining appellee's demurrer to the second paragraph of appellant's answer; and,

"3d. The court erred in overruling the appellant's demurrer to the appellee's reply to the first paragraph of appellant's answer."

These several alleged errors we will consider, and decide the questions thereby presented, in their enumerated order.

First. The cause of action, stated in appellee's complaint, is appellant's written obligation to pay to the appellee a certain sum of money, as a donation, for the purpose of building and making the necessary abutments and approaches for a certain bridge, over a certain stream, at a certain point, within Marion county, Indiana. Whenever, in the opinion of the county commissioners of any county, the public convenience shall require that a bridge should be repaired or built over any water-course in such county, then, by the provisions of a statute of this State, entitled "An act to provide for the erection and repair of bridges," etc., approved March 3d, 1855, the county commissioners of such county are authorized to cause such bridge to be built or repaired. 1 R. S. 1876, p. 239. By the 3d section of said act, it was and is provided, that the county commissioners "shall receive and appropriate all donations for the erection and repair of bridges." Under this section, in our opinion, the appellee had full power and lawful authority to accept and receive the appellant's subscription, set out in the complaint in this action, and to appropriate the same to the erection of the bridge mentioned in said subscription. Therefore, we hold that appellant's subscription, stated in appellee's complaint, was and is a legal, valid and binding contract, and that the

Bingham v. The Board of Comm'rs of Marion Co.

facts stated in said complaint were and are amply sufficient to constitute a cause of action. Appellant's demurrer to the complaint was correctly overruled.

Second. It is urged that appellee's demurrer to the second paragraph of appellant's answer ought not to have been sustained. The alleged facts, stated in this paragraph of the answer, were, briefly, these: that the gravel road mentioned in the subscription, at the intersection of which road with Pleasant Run the proposed bridge over said stream was to be and was erected, was the property of a private corporation, which was authorized by law to take, and, at the time of said subscription and of the building of said bridge, was taking, toll from the public, for the use of and travel over said gravel road; that the bridge, abutments and approaches, mentioned in appellee's complaint, were built upon the line, and were a part of the track and bed, of the gravel road belonging to said corporation, and were to be and were built for the benefit of said gravel road and of said corporation, and were not built to connect any road or roads that were kept up, worked or controlled by the public, by the county, by any township, or by any road district; and that, ever since the erection of said bridge, said gravel road corporation had taken toll for travel over said bridge, as part of its road, and said that appellee had no power by law to let the contract for, nor to build or aid in building, said bridge or any part thereof.

Conceding all the matters alleged in this paragraph of answer to be true, as stated, they do not, in our opinion, impair or render invalid the appellant's contract. The law in relation to bridges, before cited, imposes no limits on the discretion of the county commissioners in the erection of bridges. Whenever and wherever, in the opinion of the county commissioners, the public convenience shall require the erection of bridges, the county commissioners are authorized by law to cause such bridges to be built. When the county commissioners determine that

Bingham v. The Board of Comm'rs of Marion Co.

the public convenience requires the building of a bridge at any point, that determination is final and conclusive, for no mode nor tribunal is provided by law, in or by which such determination may be reviewed. The law in relation to gravel road corporations provides no means by which they may be compelled to erect bridges on the line of their roads. And it may well be, that, on the line of such a road, public convenience may require the erection of a bridge, which the road corporation fails or neglects to build. In such a case, we know of no law which would prevent the county commissioners from erecting the required bridge, on the line of such a road. If the road corporation should illegally exact toll for the use of the bridge so erected, redress for such a grievance could be obtained in the proper mode. But the fact of such exaction of toll, if it was the fact in this case, certainly constituted no defence for the appellant to appellee's cause of action. In our opinion, no error was committed in sustaining appellee's demurrer to the second paragraph of appellant's answer.

Third. The overruling of the appellant's demurrer to appellee's reply to the first paragraph of appellant's answer was assigned as error, in the court below, in general term, and is now properly before us, for our consideration. The gist of the first paragraph of appellant's answer was, that his subscription, which he was sued on, was purely voluntary and without any consideration, and that, before the appellee had incurred any liability or expenses, by reason or on the faith of his subscription, the appellant had rescinded and withdrawn his said subscription, and had notified the appellee of such rescission and withdrawal. To this answer, appellee replied, not by any general denial, but by a special denial, in which the appellee alleged, that, before the rescission or attempted withdrawal by appellant of his subscription, the appellee had, on the faith of said subscription, incurred large expenses and liabilities, setting them out in detail; and that there was not, in

Sebrell *et ux.* v. Couch, Adm'r.

fact, any withdrawal, by appellant, of his said subscription. We think these matters constituted a good reply to the defence stated in the first paragraph of appellant's answer, and that appellant's demurrer to the reply was properly overruled.

In our opinion, the court below, in general term, did not err in affirming the judgment of that court in special term, for the errors there assigned.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

SEBRELL ET UX. v. COUCH, ADM'R.

CONTRACT.—*Construction of.—Mortgage.—Condition.—Demand.—Gift.—Decedents' Estates.*—By the terms of a mortgage which, itself, was the only evidence of the indebtedness secured by it, the debt was "to be paid by the mortgagor, to the mortgagee, when called on by said mortgagee; and the mortgagor does not agree to pay the above sum, to no " (any) "one else except said mortgagee. And the mortgagor expressly agrees to pay the sum of money, above secured, without any relief," etc.

Held, in a suit upon such mortgage, by the administrator of the estate of the deceased mortgagee, that it must be alleged in the complaint, and proved on the trial, that a demand for the payment of the debt secured was made, on such mortgagor, during the lifetime of such mortgagee, by him or his agent.

Held, also, that proof of a demand, made by such administrator, as such, was not sufficient.

Held, also, that, on the death of such mortgagee, without having demanded payment of such debt of such mortgagor, the consideration for such debt became a gift to the latter.

From the Madison Circuit Court.

C. D. Thompson, H. D. Thompson and W. R. Pierce, for appellants.

M. S. Robinson, J. S. Lounsberry and E. B. Goodykoontz, for appellee.

Sebrell *et ux.* v. Couch, Adm'r.

WORDEN, C. J.—Action by the appellee, against the appellants, to foreclose a mortgage. Issue; trial; verdict and judgment for the plaintiff.

The following is a copy of the mortgage sued upon:

“This indenture witnesseth: That we, Benjamin Sebrell and Elizabeth Sebrell, his wife, of Madison county, in the State of Indiana, doth mortgage and warrant to John P. Sebrell, of Mason county, in the State of Virginia, the following real estate, in Madison county, in the State of Indiana, to wit,” (here the land is described); “To secure the payment of one thousand dollars, to be paid by the mortgagor to the mortgagee, when called on by said mortgagee; and the mortgagor does not agree to pay the above sum to no” [any] “one else, except said mortgagee. And the mortgagors expressly agree to pay the sum of money above secured, without any relief from valuation or appraisement laws. In witness,” etc.

The complaint alleges a demand of the money by the mortgagee, in his lifetime, from defendant Benjamin Sebrell, and his refusal to pay; also, the death of said mortgagee and the appointment of the plaintiff as his administrator, and that the plaintiff, as such administrator, before the commencement of this action, made a demand.

The complaint was good, because it contained an averment of the demand of the money by the deceased, in his lifetime, from said Benjamin. But this averment was not proved on the trial; a demand by the administrator, only, being proved.

Indeed, the case seems to have been tried on the theory that no demand by the deceased was necessary, in order to entitle the administrator to maintain the action.

There was no note or other document accompanying the mortgage; and the question arises, whether the latter bound the mortgagor Benjamin to pay the money, absolutely, or only upon the condition that it should be demanded or called for by the mortgagee. The language

Sebrell *et ux.* v. Couch, Adm'r.

of the mortgage is, "To be paid by the mortgagor to the mortgagee, when called on by said mortgagee." This language seems to us to imply that the money was not to be paid at all, unless the mortgagee, in person or by agent, should call upon the mortgagor for it. And this view is strengthened by the stipulation following that above set out, viz., that "the mortgagor does not agree to pay the above sum to no" [any] "one else, except said mortgagee."

The fair construction of the mortgage, as we think, bound the mortgagor Benjamin to pay the money specified, when he should be called upon for that purpose by the mortgagee; and if not called upon by the mortgagee for that purpose, he was not bound to pay it at all. The condition on which he was to pay was, that the mortgagee should call on him for payment, and that condition not having been performed, he was not bound to pay at all. Any other interpretation of the mortgage would do violence to its terms, and frustrate the intention of the parties, as gathered from the language employed by them. There is no analogy between the case here and the case of a note payable on demand, generally, on which suit may be brought without any demand. *Fankboner v. Fankboner*, 20 Ind. 62; *Mercer v. Patterson*, 41 Ind. 440. Here, a demand was not only to be made, but it was to be made by the mortgagee himself; implying, when taken in connection with what follows in the mortgage, that, if he did not choose to make it, the debt was not to be paid at all.

It may well have been that the mortgagee never intended that the debt should be paid at all, unless he himself should have occasion or see proper to demand it; intending, if he should not demand it, that the consideration of the indebtedness should be retained by the mortgagor, as a gift or gratuity. And dying without having demanded the debt, the gift became complete and perfect.

This in no way contravenes the doctrine, that, to constitute a valid gift, the thing given must be delivered to

Butler et al. v. Holtzman et al.

the donee. It may be assumed that the consideration for the mortgage, whatever it may have been, was delivered to the mortgagor, at or before the execution of the mortgage; and this consideration is what constitutes the gift, the mortgagee not demanding payment in his lifetime, according to the terms of the mortgage.

The stipulation in the mortgage to pay the sum secured, without relief, etc., taken in connection with what precedes it, has reference to payment, only "when called on by said mortgagee."

We are of opinion, that, by the terms of the mortgage, the money was not to be paid, unless the mortgagee should, in his lifetime, call upon the mortgagor for it; and, that not having been shown, the defendants' motion for a new trial should have prevailed.

We may observe, that, if a different interpretation could be given to the contract by proof of surrounding facts, no such circumstances were alleged or proved by the plaintiff. On the contrary, such circumstances as were shown by the defendants tended to sustain the construction we have placed upon the contract.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

BUTLER ET AL. v. HOLTZMAN ET AL.

SPECIFIC PERFORMANCE.—Title-Bond.—Equitable Title.—Descent.—Widow.—

Sheriff's Sale.—Evidence.—A. purchased certain real estate, at a sheriff's sale thereof, receiving the proper certificate of such purchase, which he subsequently lost; and, though the time for the redemption of such real estate expired without its being redeemed, he never received a conveyance therefor. Subsequently he sold and delivered possession of such realty to B., executing to the latter a title-bond, in which his wife did not join, binding himself to convey the same to B., his heirs or assigns, on payment of the purchase-money of such sale. B. having assigned

55	125
134	085
55	125
100	08

Butler et al. v. Holtzman et al.

such bond, and delivered the possession of such realty, to C., the latter paid such purchase-money to A., who, without making such conveyance, died, and C. brought suit against the widow and heirs of A., to obtain a decree for the specific performance of the terms of such title-bond.

Held, that such widow and heirs were not entitled to any part of such realty, A. having parted with his equitable interest therein, by the execution of such title-bond, and that C. was entitled to such decree.

Held, also, that evidence of the statements of A., that he had made such title-bond because of the loss of such certificate, was immaterial.

From the Monroe Circuit Court.

J. H. Loudon and J. H. Rogers, for appellants.

R. W. Miers, for appellees.

BIDDLE, J.—Complaint by appellees, to enforce the specific performance of a title-bond. The appellants were all defaulted, except Elizabeth Butler; she answered by a general denial, and filed a counter-claim, setting up that Frederick T. Butler died seized of the lands in controversy, leaving her his widow, and that she is entitled to one-third of the lands. To the counter-claim, the appellees answered by a general denial and a special paragraph. A demurrer was filed to this paragraph, on the ground of a want of facts alleged; the demurrer was overruled, and exceptions reserved; but we do not notice this question, as the special paragraph went merely to the denial of the counter-claim, and, as the general denial was in, no error was committed. The cause was tried by the court, and a finding had for the appellees, which was questioned by the proper motions and exceptions, over which the court decreed a specific performance of the bond. Appeal.

The controlling facts of the case, about which, we believe, there is no material dispute between the parties, are as follows:

In 1865, Jacob Wampler recovered judgment against John D. Vint, in the court of common pleas, for seventy-five dollars, and costs. Execution was issued upon the judgment, the land described in the title-bond levied

Butler et al. v. Holtzman et al.

upon as the property of Vint, and sold by the sheriff to Frederick T. Butler, to whom the sheriff executed the proper certificate of purchase, which was afterwards lost. Frederick T. Butler sold the land to James Burton, and gave him the title-bond in question, conditioned to execute a proper conveyance to Burton, his heirs or assigns, on payment of the purchase-money. Burton assigned the bond to the plaintiffs, who paid the purchase-money for the land. Vint never redeemed the land. Butler occupied it four years before he made the title-bond to Burton, and died, but never received the sheriff's deed. Burton entered in and possessed the land, under his title-bond, and the plaintiffs entered in and possessed the land, under their assignment from Burton.

There is a question of evidence raised as to certain testimony of George A. Buskirk, who was allowed to state, over the objection of the appellants, that "Said Butler informed me that he had lost the certificate of purchase, and made the bond to Burton because he had lost the certificate of purchase." It does not appear whether this statement of Butler's was made while he owned the land, or after he had sold it; but no such objection was pointed out to the testimony. We hold, however, that the testimony, as against the appellants, was immaterial. Their rights are just the same, whether the certificate was lost or not. Both parties agree that it once existed.

It is insisted, on behalf of the appellants, that, as Butler owned the land for several years after he was entitled to the sheriff's deed, and occupied the same under his certificate of purchase, he became seized thereof, and held a title which he could not convey, unless his wife joined in the deed. We have come to a different conclusion. If Butler had died while he held an equitable title to the land, under the sheriff's certificate, and before he had made the title-bond in question, and before he had received the consideration for the sale of the land, his widow and heirs would have had an interest therein; but

Watt, Guardian, v. De Haven.

the facts show that he never was seized of the land, during the marriage, and that, at the time of his death, he had no interest in it, whatever; there was, therefore, nothing left in the land for his widow and heirs to take. 1 R. S. 1876, p. 413, sec. 27.

We think there is no error in the record.

The judgment is affirmed, with costs.

WATT, GUARDIAN, v. DE HAVEN.

NEW TRIAL.—*Motion For.*—*Evidence Excluded.*—Where the cause relied upon as ground of a motion for a new trial of a cause is the improper exclusion of evidence offered on the trial of such cause, such motion must specify particularly the evidence so excluded.

SUPREME COURT.—*Practice.*—*Weight of Evidence.*—The Supreme Court, on appeal, will not disturb the finding of the lower court, on the mere weight of the evidence, even where the preponderance thereof seems to be against the finding.

From the Fayette Circuit Court.

W. Morrow, N. Trusler and J. S. Reid, for appellant
J. C. McIntosh and B. F. Claypool, for appellee.

Howk, J.—Isaac De Haven, as plaintiff, sued the appellee, as defendant, in the court below, to recover the amount of certain notes, and to foreclose a certain mortgage, given to secure the payment of said notes, all executed by said appellee, to said Isaac De Haven. Before any proceedings were had in the case, in the court below, the said Isaac De Haven, in a proper proceeding for that purpose, in the court below, was duly declared a person of unsound mind and incapable of managing his own estate, and the appellant was duly appointed and qualified as his guardian, and filed his supplemental complaint in this action, setting forth the foregoing facts.

Watt, Guardian, v. De Haven.

Appellee answered the appellant's complaint, in three paragraphs, as follows :

1st. A general denial;

2d. That the notes described in the complaint, and each of them, were executed without any consideration whatever; and,

3d. That, before the commencement of this action, the appellee fully paid the notes, and each of them, described in the complaint.

To the second and third paragraphs of appellee's answer, the appellant replied by a general denial.

And the action, being at issue, was tried by the court below, without a jury; and the court found for the appellee. And upon written causes filed, the appellant moved the court below for a new trial; which motion was overruled by the court, and to this decision the appellant excepted, and judgment was rendered upon the finding, in favor of appellee and against the appellant, from which this appeal is now here prosecuted.

The only error assigned by the appellant, on the record of this action, is the overruling of his motion for a new trial. In his motion for such new trial, the appellant assigned the following causes therefor, to wit :

"1st. That the finding of the court below was not sustained by sufficient evidence;

"2d. That the finding of the court below was contrary to law; and,

"3d. That the court below erred, in ruling out evidence offered by the appellant, on the trial of said cause, the same being competent and relative to the issues of said cause."

By the settled law of this State, the third alleged cause for a new trial was too vague, uncertain and indefinite, in this, that it failed to point out what evidence it was, that the court below erroneously ruled out or excluded. The motion for a new trial must particularize the evidence

Ogle et al. v. Dill et al.

improperly excluded, or the court below need not, and this court will not, consider the alleged error. *Meek v. Keene*, 47 Ind. 77; *Bowman v. Phillips*, 47 Ind. 341.

The other causes, assigned in the motion for a new trial, present for our consideration the pure and simple question, whether the finding of the court below was sustained by sufficient evidence. We think that the evidence in the record was amply sufficient to sustain the finding of the court below; but, if we thought otherwise, we would not, under the well established practice of this court, disturb the finding on the mere weight of the evidence.

The judgment of the court below is affirmed, at the appellant's costs.

OGLE ET AL. v. DILL ET AL.

55	180
155	81

INJUNCTION.—*Water-Course.—Mill-Dam.—User.—Adverse Possession.—Pleading.*—That the defendant and his grantors, for the preceding fifty years, adversely and under a claim of ownership, had continuously enjoyed and used the right to flow the water, of a stream running through the lands of both, back upon the lands of the plaintiff, by means of a mill-dam across such stream, used during such period, is a sufficient answer to a complaint to enjoin the defendant, on the ground that such dam will not be of public utility and will be injurious to the plaintiff, from repairing or rebuilding it when injured or thrown down by high water.

SAME.—*License.*—That such use was enjoyed for such period, by the defendant and his grantors, by virtue of a license from the grantors of the plaintiff, and that upon the faith thereof defendant and his grantors had expended large sums of money in erecting such dam, is also a sufficient answer to the complaint in such cause.

SAME.—*Insolvency.*—Where, for the reason alleged in such complaint, that, owing to the insolvency of the defendant, an action at law for damages for the erection of such dam would be an inadequate remedy, a temporary restraining order against the defendant is granted, an answer of such use and license renders such allegation of insolvency immaterial, and it need not be denied in such answer.

Ogle et al. v. Dill et al.

SAME.—Temporary Restraining Order.—Dissolution of.—Where, upon such complaint's being verified by the plaintiff, a temporary order, restraining the defendant from proceeding to rebuild such dam, is granted by the court, on the filing of an answer alleging such adverse possession, use and license, verified by the defendant, and by others who profess to know the facts, but are not parties to the action, an order of such court, during the pendency of such cause, dissolving such temporary restraining order, is not error.

SAME.—Practice.—A motion to reinstate a temporary restraining order, which has been dissolved, is, in effect, a motion for a new and different order.

SAME.—Supreme Court.—Appeal.—Interlocutory Order.—The refusal of the circuit court, in term time, or of a judge, in vacation, to grant a temporary restraining order during the pendency of a suit for a perpetual injunction, is not an interlocutory judgment or order from which an appeal lies to the Supreme Court.

From the Hamilton Circuit Court.

A. F. Shirts and *G. Shirts*, for appellants.

W. Garver and *J. W. Evans*, for appellees.

NIBLACK, J.—This was a proceeding, in the court below, by the appellant, against the appellees. The complaint alleged, that the appellants were the owners in severalty of two contiguous tracts of land, in Hamilton county, through which Stony Creek runs, from east to west, and that the appellees were the owners of other adjoining lands, in said county, lying on the west and the south, through which said stream also runs. That the appellees had prepared to commence, and were proceeding immediately to commence, the construction of a mill-dam on their lands, to the height of six and one-half feet, across said stream, at a designated point, which, if erected to that height, would, at the ordinary tide in said stream, overflow portions of each of the tracts of land so severally owned by the appellants, as above stated. That no damages had been assessed or tendered by the appellees, and that, if said dam should be erected, as proposed, it would cause great damage to the appellants, for which they would have no adequate remedy, as the appellees were insolvent.

Ogle et al. v. Dill et al.

The first paragraph of the complaint prayed that the appellees might be temporarily restrained from erecting said dam, until notice of the pendency of the suit could be given. Also, that a writ for the assessment of damages might be issued, and that the appellees might be further enjoined and restrained from the erection of said dam, until the proper damages shall be first assessed and paid.

The second paragraph charged that the proposed dam, when erected, would not be of public utility, and prayed that the appellees might be perpetually enjoined and restrained from erecting the same.

The complaint was duly sworn to, and, having been filed during the early part of the September term, A. D. 1875, of the court below, an injunction, temporarily enjoining and restraining the appellees from proceeding with the erection of the dam, was immediately granted, of which, notice was ordered to be given to the appellees, and the further hearing of the cause was postponed until a later day of the term.

On the day named for such further hearing, the appellees appeared and filed their answer to the appellants' complaint, in two paragraphs.

First. That, for about fifty years then last past, there had been erected, at the point named in the complaint, a mill-dam across said Stony Creek. That, during that time, said dam had been maintained and continued, without interruption, except only for such periods of time as were necessary for rebuilding or repairing the same, or portions thereof. That, by the floods of the summer preceding, a large portion of said dam had been swept away, and that the appellees were then, and for more than a month past had been, engaged in repairing and rebuilding said dam, to the height that it had been maintained for more than twenty years then last past. That the appellees and their grantors, for fifty years then immediately preceding, had adversely and continuously enjoyed and used, as their

Ogle et al. v. Dill et al.

own, under a claim of ownership, the right to flow the water in said stream back upon the lands of the appellants, described in their complaint, to the full extent to which it had been used during said period of fifty years, and to the full extent which the appellees propose to flow back said water by the erection and repair of said mill-dam, complained of in the complaint.

Second. That, before the appellants became the owners of the lands they claim to own in their complaint, and while their grantors had the same in their possession, and were the absolute owners thereof, they, said grantors, gave to the appellees' grantors and those under whom the appellees claim title, the right to erect and maintain a dam across said Stony Creek, at the precise point indicated in the complaint, of a height sufficient to overflow the appellants' lands, to the extent which, they say, said lands are liable to be overflowed by the dam which the appellees were then seeking to rebuild. That, in consideration of the license and authority thus given, the appellees' grantors did erect a mill-dam, as aforesaid, across said stream, and, relying on the permission and license of the appellants' grantors, as aforesaid, the builders of the dam, from whom the appellees derive title, expended a large sum of money in the erection of said dam and the construction of a mill, mill-race, fixtures and machinery for mill purposes connected therewith, to wit, the sum of fifteen thousand dollars, of all which the appellants had notice, when they purchased the lands which they claim are now liable to be injured by the rebuilding of said dam. That since the erection of said dam, as aforesaid, under the license and authority of the appellants' grantors, the same has been kept up and maintained, to the height to which, it is alleged, the appellees propose to rebuild it, continuously and without interruption, except only for brief intervals necessary for repairs, when injured by sudden floods, until the commencement of this suit. That, by the floods of the summer then immediately pre-

Ogle et al. v. Dill et al.

ceding, said dam had been injured and partially destroyed, and that the appellees were, at the time of the commencement of this suit, engaged in rebuilding and repairing the same, up to its original height, and it was this rebuilding and repairing which constituted the supposed grievances, complained of by the appellants.

The appellees' answer was verified by the affidavits of one of the appellees, and of thirteen other persons of the neighborhood, who claimed to have knowledge of the material facts therein stated.

The appellants demurred to each paragraph of the answer, separately, alleging that neither one of said paragraphs contained facts sufficient to constitute a defence to the action.

The court overruled the demurrer to both paragraphs of the answer, to which the appellants excepted.

The appellees then, upon the facts set forth in their answer, supported by the affidavits of sundry persons, as above stated, moved the court to dissolve the temporary injunction against them, restraining them from proceeding with the erection of said dam. The court sustained the motion and dissolved the injunction, to which the appellants also excepted.

It is from the order of the court dissolving this temporary injunction that the appellants have appealed to this court, and that order is assigned for error here.

The appellants claim that the court erred in dissolving the temporary injunction, because the appellees' answer did not state facts sufficient to constitute a defence to the action; and in this way the question of the sufficiency of the answer is presented for our consideration.

It is objected that the answer does not either admit or deny many of the specific allegations in the complaint, and particularly the one charging the insolvency of the appellees. Under the issues, however, which are tendered by the appellees in their answer, the question of their solvency or insolvency is an immaterial one. If

Ogle *et al.* v. Dill *et al.*

they have the absolute right to erect and maintain a dam at the point indicated in the complaint, as they claim they have, then their pecuniary condition ceases to be a matter of any interest to the appellants.

In the case of *Lane v. Miller*, 27 Ind. 534, the action was for the wrongful flowing back of water on the lands of the plaintiff, by the erection and maintenance of a mill-dam by the defendants. Two paragraphs of the answer in that cause were, in substance and in form, precisely similar to the two paragraphs of the appellees' answer in this case, and they were held good on demurrer, after a full review of all the authorities to which the attention of this court was directed.

While the action in that case was only for the recovery of damages, we think the principles involved in its defence were equally applicable to the defence in the case at bar, and that the same rules ought to govern in testing the validity of the answers in both cases.

We are of opinion, therefore, that the answer in the case before us was substantially sufficient, and that, being supported, as it was, by the affidavits of a large number of persons, not parties to the suit, the court did not err in dissolving the temporary injunction, thus leaving the parties free to contest the matters in dispute between them, upon the formation of proper issues in the cause.

After the temporary injunction had been dissolved, the appellants moved the court to reinstate it, and, in support of their motion, filed the affidavits of several persons, acquainted with the premises, some of whom were physicians, stating that the erection and maintenance of said dam would constitute a public nuisance, and be injurious to the health of the neighborhood immediately contiguous. The court, however, overruled that motion, to which the appellants also reserved an exception.

The overruling of that motion is also assigned for error in this court.

We must consider the overruling of that motion as the

 Jackson Township v. Barnes *et al.*

refusal of the court to grant another temporary injunction in the cause. That is what, in legal effect, it amounted to, as the former injunction had been dissolved, and was, hence, out of existence.

The refusal of the court, in term time, or of a judge, in vacation, to grant a temporary injunction in a cause, during its progress, does not constitute such an interlocutory order as may be appealed from to this court. See 2 R. S. 1876, p. 245, sec. 576. Hence, we can not review such a refusal here.

The order of the court below, dissolving the temporary injunction in this cause, is affirmed, at the costs of the appellants.



55	136
134	4
55	136
138	190
55	136
153	287
55	136
167	591

JACKSON TOWNSHIP v. BARNES ET AL.

TOWNSHIP.—Power to Contract.—A civil township has no power to make a contract for the benefit of school property.

SAME.—Parties.—A suit against a township, in its name as a civil township, upon a contract made by the trustee of such township as "township trustee," for school furniture, is a suit against the civil township, and can not be maintained.

SAME.—In a suit against such township, in its name as a civil township, an allegation that it is "a corporation for the purposes of common schools" does not render such action one against the school township, but is a mere *descriptio personæ*.

PROMISSORY NOTE.—Suit by Assignee.—Evidence.—In a suit against the maker, only, of a promissory note, by one alleging himself to be the owner thereof by a written assignment, such assignment must be given in evidence on the trial of such cause, or the plaintiff can not recover.

From the Huntington Circuit Court.

H. B. Sayler and *J. B. Kenner*, for appellant.

B. M. Cobb, for appellees.

Howk, J.—The appellees, as plaintiffs, sued Jackson township, of Huntington county and the State of Indi-

Jackson Township v. Barnes et al.

ana, "a corporation for the purposes of common schools," as defendant, in the court below. Appellees' complaint was in a single paragraph, and it was alleged therein, in substance, that on the 10th day of June, 1869, the appellant, by its agent, the township trustee, Michael Minnich, became indebted to D. D. Vandie & Co. in the sum of two hundred and eighty-eight dollars, with interest from date, for twelve sets of Monteith's School Maps, purchased and used by appellant as school apparatus, and proper and necessary as such, and, as evidence of such indebtedness, the appellant executed its written obligation to pay said amount, on the 1st day of June, 1872, which obligation was assigned, by endorsement thereon, in writing, to appellees, and copies of which were filed with and made part of said complaint. And the appellees averred, that said money and interest were due and unpaid, and that, since the same became due, the sum of three thousand dollars of the fund specially set apart by law to pay such claims, to wit, the special school fund of said township, had come into the hands of appellant's agent, the township trustee, and that the appellant, though often requested, had failed, refused and neglected to pay said sum or any part thereof. And appellees demanded judgment for five hundred dollars, and other proper relief.

The written obligation, mentioned in appellees' complaint, was in the words and figures following, to wit:

"\$288.00.

ROANOKE, IND., June 10th, 1869.

"Treasurer of Jackson township, Huntington county, State of Indiana, will pay to D. D. Vandie & Co., Greenfield, two hundred and eighty-eight dollars, with interest, for twelve sets Monteith's School Maps. Payable June 1st, 1872.

(Signed) "MICHAEL MINNICH, Township Trustee."

The copy of the alleged assignment in writing of this obligation to the appellees, mentioned in their complaint, is not in the record, either as matter of pleading or as matter of evidence.

Jackson Township v. Barnes *et al.*

Appellant demurred to appellees' complaint, for the want of sufficient facts therein to constitute a cause of action; which demurrer was overruled by the court below, and to this decision appellant excepted. Appellant then answered in two paragraphs:

1st. A general denial; and,

2d. A special defence.

Appellees demurred to the second paragraph of appellant's answer, which demurrer was sustained, and to this decision appellant also excepted. There was a trial by the court below, without a jury, and a finding made, in favor of appellees and against appellant, for the sum of three hundred and seventy-eight dollars. On written causes filed, the appellant then moved the court below for a new trial, which motion was overruled, and to this decision appellant excepted. And judgment was then rendered by the court below, upon its finding, from which judgment the appellant now prosecutes this appeal.

In this court, the appellant has assigned the following alleged errors:

1st. The overruling by the court below of appellant's demurrer to appellees' complaint;

2d. The sustaining by the court below of appellees' demurrer to the second paragraph of appellant's answer; and,

3d. The overruling by said court of appellant's motion for a new trial.

It is very evident that the corporation, actually sued in this action, was the civil township, although the appellees probably intended to sue the school township. For the words, "a corporation for the purposes of common schools," where they occur in appellees' complaint, can only be regarded as mere *descriptio personæ*, and as constituting, in fact, no part of appellant's name. The appellees should have sued "Jackson School Township, of Huntington County;" for it is clear, we think, that that is the corporation, if any, which purchased the sets

Jackson Township v. Barnes *et al.*

of Monteith's School Maps, mentioned in the written obligation, which is sued on in this action. If the action had been brought against the latter corporation, we might possibly have held, that the contract sued on, although apparently executed in the name of the civil township, was, in fact, the contract of the school township, for the reason that the contract, upon its face, was a promise to pay for certain property which the school corporation, only, had the right to purchase. In the case of *Carmichael v. Lawrence*, 47 Ind. 554, it was decided by this court, that civil townships were not authorized by law to contract for the building of school-houses; nor are they authorized by law to purchase school furniture, books or maps.

The appellant in this cause is the civil corporation. *Sims v. McClure*, 52 Ind. 267; *McLaughlin v. Shelby Township*, 52 Ind. 114; and see, also, the different statutes on this subject, referred to in the latter case.

If we should hold, in this case, that the contract sued on, because it was executed in the name of the civil township, was therefore the contract of the civil township; then we would be forced to the conclusion that the contract was absolutely void, for the reason, as we have already said, that civil townships are not lawfully authorized to purchase school maps. *Carmichael v. Lawrence*, *supra*. But as this action was brought against the civil corporation, to recover a debt due and owing, if from any one, from the school corporation, manifestly, the appellees' complaint did not state facts sufficient to constitute a cause of action against the appellant, and therefore the court below erred, in overruling appellant's demurrer to appellees' complaint.

If the record of this action is perfect and complete, and we must presume it is, appellant's motion for a new trial ought to have been sustained, because the endorsement of said written obligation was not given in evidence

Kimble v. Christie.

on the trial, as is manifest from the bill of exceptions, set out in the record.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to the court below to sustain appellant's demurrer to appellees' complaint, and for further proceedings.

KIMBLE v. CHRISTIE.

PROMISSORY NOTE.—Payable in Bank.—Fraud in Procuring Signature.—Innocent Holder.—Where one, on the false and fraudulent representation of another, and in the honest belief, that it is an instrument of a different character, executes a promissory note to such person, payable in a bank of this State, he is liable for the amount thereof to an innocent endorsee thereof, before its maturity, for value.

SAME.—Pleading.—Answer.—Confession and Avoidance.—In such action an answer to the complaint, by the maker, verified by affidavit, denying any knowledge on his part of having executed such note, but admitting that, by the fraud and misrepresentation of the payee, in procuring the signature of the maker to what the latter honestly believed, and was informed, was an instrument of a different nature, he may have executed such note, is a plea, not of either general or special denial of the execution thereof, but, of confession and avoidance, and is bad on demurrer.

SAME.—Can not be Double.—The same paragraph of a pleading can not set up both a denial and matter of confession and avoidance. It may set up either but not both.

SAME.—Complaint.—In such action, if the complaint avers that the payee endorsed the note to the plaintiff, before it was due, such averment imports that the plaintiff is a *bona fide* holder thereof, for value.

SUPREME COURT.—Practice.—Demurrer.—Where the evidence given on the trial of a cause is not in the record, the overruling of a demurrer to an insufficient paragraph of a pleading is available as error on appeal to the Supreme Court, even though a remaining paragraph of such pleading is sufficient.

From the Ripley Circuit Court.

G. Durbin and *Z. T. Hazen*, for appellant.

E. P. Ferris, for appellee.

55	140
124	590
55	140
131	401
55	140
166	230

Kimble v. Christie.

WORDEN, C. J.—This was an action by the appellant, as the endorsee, against the appellee, as the maker, of a promissory note for the payment of one hundred and eighty dollars, to A. W. Hall, at The First National Bank of Columbus, Indiana, six months after the date thereof, and dated April 20th, 1874, and endorsed to plaintiff by the payee, May 5th, 1874.

Issue; trial; verdict and judgment for defendant.

The appellant has assigned and relies upon error in overruling his demurrers to the third and fourth paragraphs of the defendant's answer.

The first, second, third and fourth paragraphs of the answer were duly verified.

The first was the general denial.

The second need not be noticed, as no question arises upon it.

The third was as follows:

“For a third and further answer the defendant says, on or about the 20th day of April, 1874, a man by the name of White, whose given name is unknown to the defendant, came to the residence of the defendant, in Shelby township, Ripley county, Indiana, and represented to the defendant that he was travelling for one A. W. Hall, and appointing agents to sell ‘Hall’s Force Pump Washer,’ and desired to appoint defendant one of such agents in Shelby township, in Ripley county, and Shelby and Monroe townships, in Jefferson county, Indiana, and it was agreed that said defendant should accept said agency; that, during the negotiation relating to such contract, nothing was said between said parties about a note, or the execution of a promissory note by the defendant to said Hall or White or any other person, for any purpose whatever, and that no note was exhibited for signature, during the negotiation, at any time. That, when said defendant should accept said agency, he was, by such contract, to sell such machines and account to said Hall for the receipts of such sales, to the amount of seven dollars and

Kimble v. Christie.

one-half for each machine sold, until defendant had sold enough to come to the sum of one hundred and eighty dollars, and then defendant was to account for two and one-half dollars for each machine sold. The machines were to be ordered by express by the defendant, from some place in Ohio, and the machines were to be paid for by defendant, on delivery at the express office. Defendant says that said White represented that it was necessary to sign an agreement and contract, which, he then represented to defendant, would contain the above stipulations, and would empower defendant to order, from a certain manufactory at Adrian, Ohio, all such machines as he might want for such agency; and defendant avers, that said White made no mention, during all said negotiation, about any promissory note, or any amount to be paid by defendant, except as herein set forth. And he avers, that no such note, as in the complaint named, was read to or shown him by said White, and, if such note was contained in the paper signed by him, it was so disguised and concealed by said White and the language of said agreement, that he, said defendant, could not, with reasonable diligence, have discovered the same. The defendant says he was not accustomed to trade in such things, nor in patents of any kind; that he was ignorant of the fact that such parties had been making and attempting to make such contracts in the country. And the defendant avers, that he never gave said note, or any other note or bill of exchange, to said White, and, if this signature to said note is genuine, it was obtained without his knowledge or consent, and by some fraudulent means, to him unknown, and which he could not prevent by the use of due diligence. Wherefore the defendant says the note in suit is not his note, and he demands judgment for costs."

The fourth paragraph is the same, in substance, as the third, as far as and including the allegation in respect to making out the papers, and then proceeds as follows:

Kimble v. Christie.

“Defendant avers, that said White stated he would make out the papers in duplicate, so that defendant should have the same papers that White had, and defendant says that said papers were drawn up in the evening and signed, and said White stated that he would keep all the papers, so signed, in his possession until morning, and then, if defendant desired him to do so, he would surrender them to defendant, or destroy them and rescind the contract; and that said White did retain all the papers so drawn up and signed, until he had his team all ready to start in the morning; and defendant says that he informed White, in the morning, that he would prefer not to do anything further in the matter of the agency; but White threw down two papers that he had been preparing the evening before, and said the contract was complete and defendant had to stand to it. Defendant says said White at once left the house and drove rapidly away, and that he had no time to examine any papers before White was gone, and he says no mention was made of any promissory note, of any kind, at any time, and defendant says that no such note, as in the complaint named, was ever read or shown to him by said White, and if such note was contained in the papers signed by him, it was so disguised and concealed by said White and the language of said agreement, that the defendant could not, with reasonable diligence, have discovered the same. The defendant says he was not accustomed to trade in such things, nor in patents of any kind; that he was ignorant of the fact that such parties had been making and attempting to make such contracts in the country. And said defendant avers, that he never gave said note, or any other note or bill of exchange, to said White, and if this signature to said note is genuine, it was obtained without his knowledge or consent, and by said fraudulent means, to him unknown, and which he could not prevent by the use of due diligence. Wherefore defendant demands judgment for costs.”

Kimble v. Christie.

The counsel for the appellee claims that these paragraphs of answer are special answers of *non est factum*. It is important to determine whether they are paragraphs in general or special denial of the cause of action, or whether they set up matter in avoidance. They might be good, as mere denials, but not good as setting up matters in avoidance. A single paragraph of answer can not perform the double function of denying the cause of action, and of confessing and avoiding it. It must be one thing or the other, but it can not be both; and its character, in this respect, must be determined from the general scope of its averments. *Cronk v. Cole*, 10 Ind. 485. We are of opinion that these paragraphs attempt, not to controvert the execution of the note, but, to set up matter in avoidance thereof, and that they should be regarded, not as denials, but, as affirmative pleadings in avoidance. We think, also, that they must have been so regarded in the court below, both from their character, and from the fact that the general denial was pleaded under oath, which was broad enough to cover all matters of special denial.

The note, it will be seen, was payable at a bank in this State, and was, therefore, governed by the law merchant.

The substance of the defence set up in each paragraph is, that the defendant executed a paper without reading it, and trusting to the statement of White as to its character, which he supposed to be a contract in reference to the machines, but which turns out to be the note in suit. According to the case of *Nebeker v. Cutsinger*, 48 Ind. 436, in which the recent authorities were examined, neither paragraph alleged facts sufficient to bar the action upon the note in the hands of a *bona fide* holder. See, also, *Glenn v. Porter*, 49 Ind. 500.

But, as we understand the brief of counsel for the appellee, it is claimed that the complaint does not show that the plaintiff is a *bona fide* holder for value.

It alleges that Hall, the payee, endorsed the note to him

Hogshead v. Williams et al.

before it was due. The endorsement imports a valuable consideration. The complaint is clearly sufficient.

As the evidence is not in the record, we can not say that the verdict for the defendant was not based upon proof of the paragraphs in question, and we can not say, therefore, that the plaintiff was not injured by the ruling on the demurrers to these paragraphs.

We are of opinion that the court erred, in overruling the demurrers to the third and fourth paragraphs of the answer.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

HOGSHEAD v. WILLIAMS ET AL.

55	145
138	169

PRINCIPAL AND SURETY.—*Delay of Judgment Creditor in Issuing Execution.*—

Insolvency of Principal.—Though contrary to the request of the surety, and during its continuance the principal becomes insolvent, a voluntary delay, by a judgment creditor, in issuing execution upon a judgment obtained against such principal and surety, as such, before a justice of the peace, does not discharge such surety, though the principal remain solvent for a sufficient period, after the rendition of such judgment, for the amount thereof to be made by execution.

SAME.—*Surety may Protect Himself.*—*How.*—Where, in a suit against a principal and surety, the latter desires to protect himself against a probable future insolvency of the former, he may, at the time judgment therein is rendered, object to granting any stay of execution, or he may pay off said judgment and have execution thereon for his own benefit.

From the Daviess Circuit Court.

J. W. Burton and J. W. Ogdon, for appellant.

NIBLACK, J.—The appellant was the plaintiff, and the appellees were the defendants, in the court below.

The complaint alleges “that heretofore, to wit, on the 22d day of June, 1872, the said James Williams, as the

Hogshead v. Williams et al.

assignee of one James Crabb, brought suit, on a note, against the plaintiff, as surety, and one William M. Spencer, as the principal therein, before Burrill F. Meredith, a justice of the peace in and for Washington township, Daviess county, Indiana, and on the 22d day of June, 1872, obtained judgment thereon against the plaintiff, as surety, and against the said William M. Spencer, as the principal in said note, for the sum of one hundred and seventy-three dollars, with costs taxed at four dollars and thirty-five cents; and the plaintiff says that the said James Williams afterwards, on the 30th day of June, 1872, ordered the said justice not to issue any execution on said judgment, although the said William M. Spencer then had a sufficiency of property to satisfy said judgment, subject to levy and sale, in said township and county, and although the plaintiff expressly requested him, the said Williams, to have an execution issued on said judgment.

“The plaintiff further says, that, at the time of ordering the justice not to issue an execution on said judgment, as aforesaid, he, said Williams, well knew that the said Spencer had a sufficiency of property, subject to levy and sale, as aforesaid, to fully pay and satisfy said judgment and costs.

“The plaintiff further avers, that the said James Williams owned and controlled said judgment, from the time of the rendition thereof until the 26th day of February, 1874, during all of which time no execution was issued on said judgment, on account of the aforesaid order to such justice, although the said Spencer, during all that time, had a sufficiency of property subject to levy and sale, to satisfy the same, which said Williams well knew, and although the plaintiff ordered the said Williams, repeatedly, to issue an execution thereon, and enforce the payment of said judgment from the said Spencer.

“The plaintiff further says, that, on the 26th day of

Hogshead v. Williams et al.

February, 1874, the said Williams sold and assigned said judgment to the defendant Richard Bruner, who ordered and had an execution to issue on said judgment, on the 15th day of June, 1874, with full knowledge of the prior acts of his assignor, James Williams, and with full knowledge of all the facts hereinbefore stated, and of the rights and equities of the plaintiff herein, which said execution was delivered to the defendant Richard W. Meredith, then duly qualified and the acting constable in said cause, and that the said Richard W. Meredith had and held said execution until the 6th day of May, 1875, during which time he, the said Meredith, made no effort to collect the same by levy and sale or otherwise, although the said Spencer, at all times, had a sufficiency of property subject to levy and sale, to satisfy said judgment.

“The plaintiff further says, that, on the said 6th day of May, 1875, the said Bruner caused another execution to issue on said judgment, to the said Richard W. Meredith, as such constable, and that the said Richard W. Meredith is now threatening to levy upon, and make sale of, the plaintiff's property to satisfy the same; * * * that the said William M. Spencer is now notoriously insolvent, and has no property subject to execution, with which to satisfy said execution or any part thereof.

“Wherefore the plaintiff asks that the said Williams and Bruner be perpetually restrained and enjoined from asserting any claim against the plaintiff on account of said judgment, and that the said Richard W. Meredith and his successors in office be forever restrained, enjoined and inhibited from proceeding to collect said judgment, as against the plaintiff, and for all other proper relief in the premises.”

A transcript of the proceedings and judgment before the justice were filed with the complaint, and made an exhibit in the cause.

The defendants demurred to the complaint, alleging, as a ground of objection, that it did not state facts sufficient

Hogshead v. Williams et al.

to constitute a cause of action. The court sustained the demurrer, to which the plaintiff excepted, and judgment on the demurrer was rendered in favor of the defendants.

The appellant has assigned for error the action of the court below in sustaining said demurrer, and thus the sufficiency of the complaint is the only question submitted to us for our consideration.

It is a well settled principle of law, in this State, that the gratuitous giving of time by a creditor to his principal debtor does not discharge the surety. *Carr v. Howard*, 8 Blackf. 190; *Braman v. Hawk*, 1 Blackf. 392; *Colerick v. McCleas*, 9 Ind. 245; *Harter v. Moore*, 5 Blackf. 367; *Kirby v. Studebaker*, 15 Ind. 45; *Naylor v. Moody*, 3 Blackf. 92; *Coman v. The State, ex rel., etc.*, 4 Blackf. 241; *Barker v. M'Clure*, 2 Blackf. 14; *Meniffee v. Clark*, 35 Ind. 304.

Time given, without consideration, by the creditor, to the debtor, and without the consent of the surety, will not discharge the surety. *Shook v. The Board of Commissioners, etc.*, 6 Ind. 461; *Cheek v. Glass*, 3 Ind. 286; *Shook v. The State, ex rel., etc.*, 6 Ind. 113; *Halstead v. Brown*, 17 Ind. 202.

There is no allegation in the complaint before us, that there was any consideration for the extension complained of, or that it was given upon any contract or agreement, which, in any manner, restrained the appellees or any one or more of them. The alleged request of Williams to the justice, not to issue execution on the judgment, did not restrain Williams from having an execution upon it, when otherwise entitled to it. For aught that appears in the complaint, the request was without consideration, and might have been recalled at any time.

The appellant might, when the judgment was rendered, have objected to the stay of execution upon it. See 2 R. S. 1876, p. 205, sec. 430. But it is not shown that he did so.

The appellant avers that he repeatedly requested the

Hiatt v. Powell.

said Williams, while he was the owner of the judgment, to have execution issued upon it, but that he failed and neglected to do so. We are not aware of any provision of law which releases the appellant on that account. In our State, a surety can be released only by affirmative action of his own, under some provision of the statute. See *Halstead v. Brown*, above quoted.

The appellant might, at any time after it was rendered, have paid off the judgment and assumed the collection of it for his own use. See, also, 2 R. S. 1876, p. 279, sec. 676. This, however, it seems, he did not do.

Upon the facts alleged in the complaint, the appellant must be presumed to have acquiesced in the delay he complains of, and we think the court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

HIATT v. POWELL.

SUPREME COURT.—Practice.—Bill of Exceptions.—New Trial.—Where no question is raised upon the pleadings in a cause, if the bill of exceptions be not filed within the time prescribed by the court trying such cause, it forms no part of the record, and no question is presented to the Supreme Court, on appeal thereto.

From the Blackford Circuit Court.

W. A. Bonham, J. Cantwell and W. H. Carroll, for appellant.

B. F. Williams, for appellee.

BIDDLE, J.—In this cause, no question was raised upon the pleadings.

The case was tried on the 15th day of December, 1874. On the same day a motion for a new trial was made and

Fuhrer, Adm'r, v. The State, *ex rel.* The Attorney General.

overruled, exceptions taken, judgment rendered and sixty days allowed to file a bill of exceptions. What purports to be a bill of exceptions was filed on the 1st day of April, 1875. Not having been filed in time, it is no part of the record; and there is, therefore, no question before us.

The judgment is affirmed, with costs.

FUHRER, ADM'R, v. THE STATE, EX REL. THE ATTORNEY GENERAL.

DECEDENTS' ESTATES.—Final Settlement.—Failure of Heirs to Claim Surplus.—

Escheat.—Duty of Court.—Where, from the final settlement report of the administrator of a decedent's estate it appears that there is a surplus in his hands for distribution, upon the expiration of two years from the filing and approval of such report, without the appearance of any heirs to claim such surplus, it escheats to the State, and it is the duty of the court having jurisdiction of such estate to order such administrator to pay such surplus to the proper county treasurer, for the use of the State.

SAME.—Removal of Administrator.—Appointment of Successor.—Suit on Bond.—Prosecuting Attorney.—Duty of.—Upon the failure of the administrator to obey such order, by paying over the surplus to such county treasurer, it is the duty of the court to remove such administrator and appoint his successor, who should bring suit against his predecessor, on his bond; and it is the duty of the prosecuting attorney of such court to prosecute such suit in court.

SAME.—Officer.—Failure of to Perform Duty.—Attorney General.—Parties.—Statute Construed.—Upon the failure of the court to so order the administrator to so pay over such surplus, or, upon the failure of such administrator to obey an order so made, if the court shall have failed to so remove such administrator and appoint his successor, or if, upon the removal of such administrator and the appointment of his successor, the prosecuting attorney shall have failed to institute and prosecute such suit, after the lapse of twelve months from the time when any such judicial or official action became necessary, the State, on the relation of her attorney General, under section 9 of the act supplemental to the act providing for his election, (1 R. S. 1876, p. 152,) may institute a suit on such bond, to recover such surplus.

Fuhrer, Adm'r, v. The State, ex rel. The Attorney General.

From the Posey Circuit Court.

M. W. Pearse, for appellant.

C. A. Buskirk, Attorney General, for the State.

Howk, J.—The State of Indiana, on the relation of Clarence A. Buskirk, Attorney General, filed a complaint, in the court below, against the appellant, in substance as follows:

That, on the 14th day of March, 1865, the appellant was duly appointed and qualified, as administrator of the estate of John Ladabat, deceased, and on the same day, as such administrator, he received the sum of one thousand three hundred and ninety-four dollars and twenty-five cents, belonging to said estate; that on the 12th day of July, 1867, the appellant made a final settlement report, as administrator of said decedent's estate, to the proper court, showing a balance in his hands, belonging to said estate, of one thousand and fifty-eight dollars and fifty cents, for distribution, which report was received and approved by said court, and the distribution of said sum was ordered; that on the 6th day of July, 1871, a citation was issued by said court, against the appellant, as such administrator, requiring him to show cause why he had not made distribution of the funds in his hands, belonging to said estate, which citation was duly served on him, on the same day it was issued, but he wholly failed and refused to appear and answer said citation; that more than two years had elapsed since the final settlement of said estate, and that no heirs of said decedent had appeared, to claim the surplus of said estate, or any part thereof, and that said estate had escheated to the State of Indiana; and the appellee asked for an order, requiring the appellant to pay said sum of one thousand and fifty-eight dollars and fifty cents, belonging to said decedent's estate, and interest on the same, in the aggregate one thousand seven hundred dollars, over to the treasurer of Posey county.

The appellant demurred to appellee's complaint, for the

Fuhrer, Adm'r, v. The State, *ex rel.* The Attorney General.

alleged insufficiency of the facts therein to constitute a cause of action. This demurrer was overruled by the court below, and to this decision appellant excepted. And the appellant, failing and refusing to answer further, the court below made a finding, that there was then in the hands of the appellant, as administrator of said decedent's estate, the sum of one thousand four hundred and sixty dollars and fifty cents, belonging to said estate, and that more than two years had elapsed since the final settlement of said estate, and that no heirs had appeared to claim said sum or any part thereof. And judgment was rendered by the court below, in favor of the appellee and against the appellant, for the amount found in appellant's hands, and the costs of this action, and that appellant should then pay said amount over to the county treasurer of said Posey county. From that judgment, this appeal is now here prosecuted.

The only alleged error, assigned by appellant in this court, is the decision of the court below, overruling his demurrer to appellee's complaint.

It is provided by section 143 of the statute of this State, providing for the settlement of decedents' estates, etc., approved June 17th, 1852, as follows:

"Sec. 143. If, after the expiration of two years from the final settlement of an estate, no heirs appear to claim the surplus, or any part thereof, the court shall direct it to be paid over to the county treasurer, to be by him paid over to the treasurer of State, who shall credit it upon the books to the unknown heirs of the decedent." 2 R. S. 1876, p. 545.

By section 145 of the same act, it is provided, that, if an "administrator fail to pay into court any money belonging to such estate, of which there are no known heirs, * * * the court shall remove him from his trust, and appoint a successor, who, having qualified and given bond according to law, shall bring suit against such delinquent * * * administrator on his bond, which

Fuhrer, Adm'r, v. The State, *ex rel.* The Attorney General.

suit the prosecuting attorney of the proper court shall prosecute, he being allowed by such court a reasonable compensation therefor, to be paid out of the damages assessed in such suit." 2 R. S. 1876, p. 545.

It is insisted by appellant's attorney, that the complaint in this action is insufficient, because it does not allege that the appellant had been removed from his trust, that his successor had been appointed and qualified, and that such successor and the prosecuting attorney had failed or refused, for twelve months, to institute the proper proceedings against the appellant and his sureties, as provided in section 145, last cited. This is the only point made by appellant's counsel, in his argument of this cause. That is, the appellant admits that he has a large sum of money in his hands, which escheated to the State nearly eight years ago, and which he has not the slightest title to nor interest in; and he admits that the proper court ought to have removed him from his trust, and appointed his successor in said trust, and that that successor and the prosecuting attorney ought to have sued him on his bond, for his delinquency. And, upon the vain pretext that the Attorney General was not authorized by law to bring this suit, the appellant apparently founds all his hopes for a reversal of the judgment of the court below.

We think that the case made by appellee's complaint in this action is clearly within the spirit, intention and meaning, if not within the strict letter, of the 9th section of the act supplemental to the act, providing for the election, etc., of the Attorney General of the State, approved March 10th, 1878. 1 R. S. 1876, p. 152. By this section it is provided, among other things, that, in cases where the officers whose duty it shall be to collect money unclaimed in estates, or moneys that escheat to the State for want of heirs, shall fail, neglect or refuse to do so, for twelve months after the cause of action in favor of the State shall have accrued, the Attorney General shall insti-

Fuhrer, Adm'r, v. The State, *ex rel.* The Attorney General.

tute, or cause to be instituted and prosecuted, all necessary proceedings to compel the payment of the money.

In this cause, it is admitted that the final settlement of the estate of appellant's intestate was made on the 12th day of July, 1867. Two years afterwards, or on the 12th day of July, 1869, the State's cause of action, or right to the money, accrued, under section 143, above cited, of the act providing for the settlement of decedents' estates. The judge of the proper court, the officer whose plain legal duty it then was to direct and see that the surplus of said estate was then paid over to the county treasurer of Posey county, by the appellant, failed and neglected to discharge such duty. Afterwards more than five years elapsed, and still the judge of the proper court, the officer whose plain legal duty we have already stated, still failed and neglected to discharge such duty, and, also, still failed and neglected to remove the appellant from his said trust, and appoint his successor therein, as it was, also, the plain legal duty of such officer to do, under the requirements of said section 145, before cited. When these facts came to the knowledge of the Attorney General of the State, he would have been derelict in his plain legal duty, as we understand his duty under the law, if he had not, forthwith, instituted and vigorously prosecuted to a successful issue, this action against the appellant.

Manifestly, the only object of this appeal is the hope the appellant had, that thereby he would obtain another lease for years of a large sum of money, which did not belong to him and in which he had no possible interest, but which did belong to the State. There is no merit in such an appeal.

The judgment of the court below is affirmed, with five per cent. damages, at the costs of the appellant.

Spath v. Hankins

55	155
158	820

SPATH v. HANKINS.

REDEMPTION.—Contract For.—Forfeiture.—Unconscionable Contract.—Vendor and Purchaser.—Notice.—Demand.—Parties.—Tender.—Amendment.—On the trial of an action in the circuit court, by C. against E., to set aside certain conveyances of real estate, and allow the plaintiff to redeem the same, the findings of the facts were, that A. and B. held certain separate judgments against C., the plaintiff, the aggregate amount of which was equal to about one-eighth of the value of the real estate in controversy, upon which they were liens; that such realty was sold, at a sheriff's sale, to B., upon an execution on his, the junior, judgment, for a sum equal to the amount of his judgment and costs, and a certificate of such purchase issued to B.; that subsequently C., taking a mortgage thereon back to himself to secure an unpaid balance of the purchase-money, sold and conveyed such land, by warranty deed, to D., and put him in possession, which he still retains; that, on the last day for the redemption of such real estate, B. assigned such certificate of purchase to A., the holder of such senior judgment, to whom C. then paid, as part of the redemption money for such realty, a certain sum of money, with the agreement that if C. paid to A. the remainder of such redemption money, and, also, the amount of such senior judgment, by a time, fixed, beyond the expiration of the time for redemption, A. would surrender such certificate and all claims on such land to C., but that, on failure by C. to make such payment he should thereby forfeit his right to redeem and also such sum already paid, to A.; that within such time, so agreed upon, A. procured a deed to himself, for such realty, from the proper sheriff, and, C. having failed to make such payment within the time fixed, A. refused to surrender such certificate or to give C. further time; that A. subsequently entered into a written contract with E., to convey such realty, by quit-claim, to the latter, upon his paying to A. a sum equal to the amount of such judgments and costs; and that E., after the making of his contract with A., having received notice from C., that the latter had a contract with A., concerning such realty, though not of its nature, paid to A. the sum so agreed upon and received such conveyance.

Held, that C. retained sufficient interest in the subject-matter of the cause to bring such action.

Held, also, that the payment of such part of the redemption money to A., by C., within, and the making by them of such contract to allow the latter to redeem after the expiration of, the year therefor, waived the right of the former to a deed from the sheriff, and rendered such certificate merely a security in his hands for the payment of the remainder of such redemption money.

Held, also, that there was such disparity in the value of such land, as compared with the amount of the unpaid balance of such redemption money,

Spath v. Hankins.

that the clause of forfeiture for non-payment is unconscionable and should not be enforced ; time not being of the essence of such contract.

Held, also, that the notice to E., of C.'s contract with A., was sufficient to bind him, and that C. was entitled to a judgment setting aside the sheriff's deed to A., and A.'s deed to E., and enabling C. to redeem such land on payment of such unpaid redemption money.

Held, also, that, to maintain such action a tender of such unpaid redemption money and a demand by C., for a reconveyance of such land, before bringing it, was not necessary.

Held, also, that though, on the trial of such cause, all the evidence was heard at one term, but no finding or judgment rendered, and the cause continued until the next term of such court, there was no error in permitting the plaintiff then, before the argument of the cause, to amend his complaint, so as to therein offer to pay to the defendant whatever sum the court might find due to him to enable the plaintiff to redeem.

SUPREME COURT.—Practice.—Harmless Error.—The sustaining of a demurrer to a paragraph of a pleading is not available as error, on appeal to the Supreme Court, where all the facts therein alleged were admissible and admitted, on the trial of the cause, under a remaining paragraph of such pleading.

From the Wayne Circuit Court.

H. C. Fox, for appellant.

J. P. Siddall and *T. J. Study*, for appellee.

PERKINS, J.—Complaint to set aside deed and redeem lands of the appellee, sold at sheriff's sale. The complaint contains an offer to pay whatever the court may find due, to entitle him to redeem, with all costs, etc.

Answer, the general denial, and five paragraphs in confession and avoidance. A demurrer was sustained to three of these, and overruled to two of them, and to these two, replies were filed.

We shall not consider the rulings upon the demurrers, because they are unimportant in the decision of the cause by this court. All the evidence that could have been legally given, under the paragraphs of answer held bad, was admissible, and was admitted, upon the trial of the issues made, and a special finding, completely covering the whole case, and presenting fairly every question of law arising in it, was made by the court below, and is in the record. It is as follows :

Spath v. Hankins.

“Upon the request of both parties, that a special finding of the facts and conclusions of law thereon be made in writing, the court finds the facts of this case to be as follows :

“That, on and prior to January 11th 1870, the plaintiff was the owner in fee of the real estate described in the complaint. That on said day, William J. Hankins recovered, in the court of common pleas of said county, a judgment against the said plaintiff, for the sum of six hundred and forty-one dollars and seven cents, and costs. And, on the 14th day of July, 1870, an execution thereon was issued out of the clerk's office, of said court, to the sheriff of said county directed. That said sheriff then and there levied said execution upon said real estate, and, upon the 27th day of August, 1870, by virtue thereof, he cried off and sold the fee-simple of said real estate to said William J. Hankins, for the sum of seven hundred and twenty-two dollars and sixty-three cents, and, having received payment thereof, executed to said purchaser a certificate of sale, in due form of law. That said sheriff made return of said execution, as stated and set forth in said complaint, which return was duly recorded in the execution docket of said court, as alleged in the complaint. That, at the time of such sale, the real estate consisted of two separate tracts of land, one of one hundred and sixty acres, worth eight thousand dollars or more, the other of forty acres, worth two thousand dollars or more; the rents and profits of the former tract being worth five hundred dollars or more per year, and those of the latter one hundred and twenty-five dollars or more per year. That the said return of the sheriff upon said execution recites, among other things, that, ‘On the day set for sale, I offered, at the court-house door, in Wayne county, the rents and profits of said real estate for seven years, by the year, receiving no bid therefor. I then offered the fee-simple of each of the above described pieces of real estate,’ etc But there is no other proof as to the way or

Spath v. Hankins.

that the clause of forfeiture for non-payment is unconscionable and should not be enforced ; time not being of the essence of such contract.

Held, also, that the notice to E., of C.'s contract with A., was sufficient to bind him, and that C. was entitled to a judgment setting aside the sheriff's deed to A., and A.'s deed to E., and enabling C. to redeem such land on payment of such unpaid redemption money.

Held, also, that, to maintain such action a tender of such unpaid redemption money and a demand by C., for a reconveyance of such land, before bringing it, was not necessary.

Held, also, that though, on the trial of such cause, all the evidence was heard at one term, but no finding or judgment rendered, and the cause continued until the next term of such court, there was no error in permitting the plaintiff then, before the argument of the cause, to amend his complaint, so as to therein offer to pay to the defendant whatever sum the court might find due to him to enable the plaintiff to redeem.

SUPREME COURT.—Practice.—Harmless Error.—The sustaining of a demurrer to a paragraph of a pleading is not available as error, on appeal to the Supreme Court, where all the facts therein alleged were admissible and admitted, on the trial of the cause, under a remaining paragraph of such pleading.

From the Wayne Circuit Court.

H. C. Fox, for appellant.

J. P. Siddall and *T. J. Study*, for appellee.

PERKINS, J.—Complaint to set aside deed and redeem lands of the appellee, sold at sheriff's sale. The complaint contains an offer to pay whatever the court may find due, to entitle him to redeem, with all costs, etc.

Answer, the general denial, and five paragraphs in confession and avoidance. A demurrer was sustained to three of these, and overruled to two of them, and to these two, replies were filed.

We shall not consider the rulings upon the demurrers, because they are unimportant in the decision of the cause by this court. All the evidence that could have been legally given, under the paragraphs of answer held bad, was admissible, and was admitted, upon the trial of the issues made, and a special finding, completely covering the whole case, and presenting fairly every question of law arising in it, was made by the court below, and is in the record. It is as follows :

Spath v. Hankins.

“ Upon the request of both parties, that a special finding of the facts and conclusions of law thereon be made in writing, the court finds the facts of this case to be as follows :

“ That, on and prior to January 11th 1870, the plaintiff was the owner in fee of the real estate described in the complaint. That on said day, William J. Hankins recovered, in the court of common pleas of said county, a judgment against the said plaintiff, for the sum of six hundred and forty-one dollars and seven cents, and costs. And, on the 14th day of July, 1870, an execution thereon was issued out of the clerk's office, of said court, to the sheriff of said county directed. That said sheriff then and there levied said execution upon said real estate, and, upon the 27th day of August, 1870, by virtue thereof, he cried off and sold the fee-simple of said real estate to said William J. Hankins, for the sum of seven hundred and twenty-two dollars and sixty-three cents, and, having received payment thereof, executed to said purchaser a certificate of sale, in due form of law. That said sheriff made return of said execution, as stated and set forth in said complaint, which return was duly recorded in the execution docket of said court, as alleged in the complaint. That, at the time of such sale, the real estate consisted of two separate tracts of land, one of one hundred and sixty acres, worth eight thousand dollars or more, the other of forty acres, worth two thousand dollars or more; the rents and profits of the former tract being worth five hundred dollars or more per year, and those of the latter one hundred and twenty-five dollars or more per year. That the said return of the sheriff upon said execution recites, among other things, that, ‘ On the day set for sale, I offered, at the court-house door, in Wayne county, the rents and profits of said real estate for seven years, by the year, receiving no bid therefor. I then offered the fee-simple of each of the above described pieces of real estate,’ etc But there is no other proof as to the way or

Spath v. Hankins.

manner in which the rents and profits of said real estate were offered at such sale. That on Saturday, the 26th day of August, 1871, the said William J. Hankins, for a valuable consideration, sold and assigned the said sheriff's certificate of sale to George W. Calloway and George Raresheid. That said Calloway and Raresheid were the holders of certain other judgments against the said plaintiff, amounting in the aggregate to four hundred and ninety-nine dollars, which were liens and incumbrances on said real estate previous to the said Hankins' judgment.

"That, on the same day, the plaintiff notified said Calloway and Raresheid that he intended to redeem the said real estate from said sale, and thereupon, on said day, a verbal agreement was made between said plaintiff and said Calloway and Raresheid, touching the redemption of said real estate, and to the effect that he [plaintiff] should then and there pay them, on account of such redemption, the sum of four hundred dollars, and should pay the balance required to redeem said lands, to wit, three hundred and ninety-four dollars and thirty-four cents, and, also, the amount of said other judgments held by them against him, within three weeks thereafter; but if the plaintiff failed to pay said balance and the amount of said judgments within said time, then the said sum of four hundred dollars, so paid, was to be forfeited to said Calloway and Raresheid, and the plaintiff's right of redemption was to cease; and thereupon the plaintiff paid said sum of four hundred dollars to said Calloway and Raresheid. That, at the time of making such agreement, neither of said parties had any actual notice or knowledge of any defect or irregularity in the said sheriff's sale, but all of them regarded and treated said sale as regular and valid.

"That, on Saturday evening of the third week after making such agreement, the said parties met, according to previous arrangement, for the settlement of said balance, and thereupon the plaintiff notified said Calloway

Spath v. Hankins.

and Raresheid that he had only two hundred dollars of said balance due on said balance, and could not then pay the residue, and requested them to give further time in which to pay such residue, promising to pay the same on or before the following Tuesday, but the said Calloway and Raresheid then and there refused to give further time, and stated to plaintiff, that, if he would pay the whole balance then due that night, they would turn over the certificate to him, but not otherwise; plaintiff replied that he could not do that, as he did not have the money. And the plaintiff has never since paid or tendered to said Calloway and Raresheid, or said defendant, or either of them, the said balance, or any part thereof. Nor did the plaintiff, before the commencement of this suit, demand of defendant a reconveyance of said land, or cancellation of said deed, or offer to redeem by paying any sum whatever.

“That said sheriff of said county, on the 27th day of August, 1871, executed to said Calloway and Raresheid a deed for the said real estate, pursuant to said certificate of sale, and on the 22d day of January, 1872, said Calloway and Raresheid, for the consideration of one thousand three hundred dollars, executed a quit-claim deed of said real estate to said defendant, part of which purchase-money was applied to the payment of the said judgment, so held by said Calloway and Raresheid, against said plaintiff, relieving the plaintiff and the said land therefrom.

“The defendant, at the time of contracting for said land and paying said consideration therefor, had no actual notice or knowledge of any defect or irregularity in said sheriff's sale. That in November, 1871, after the defendant had contracted, in writing, with said Calloway and Raresheid, for the purchase of said real estate, but before he had paid any part of the purchase-money therefor, the plaintiff and defendant had an interview, in which the plaintiff stated to defendant that he [plaintiff] had made

Spath v. Hankins.

a contract with Calloway and Raresheid, and had paid them four hundred dollars on the Hankins judgment, on which they had a certificate of sale, to which defendant replied that he had purchased the farm, had made a written agreement with the parties for it, and was to have a deed when he paid them the money. And, thereupon, the plaintiff said to defendant, 'You had better keep your money. I have a contract with Raresheid and Calloway, and intend to hold them to the contract.' But none of the terms or conditions of said contract were inquired of by the defendant, or were stated by the plaintiff to defendant, and the defendant, at no time before paying said purchase-money and taking said deed, had any other notice or knowledge of the making of said contract, or payment of said money, by plaintiff, to Raresheid and Calloway.

"That the said plaintiff, on the 21st day of October, 1870, executed a deed of general warranty for the said real estate, to one Magdalena Kleiber, who then and there took possession of said real estate, and has ever since held and still holds possession thereof, and, on the 2d day of November, 1870, the said Magdalena Kleiber and John Kleiber, her husband, executed to said plaintiff a mortgage on said real estate, to secure the sum of ten thousand dollars of the purchase-money thereof, which said mortgage was duly recorded on the 1st day of February, 1871, and the same still remains unpaid and unsatisfied. That the balance remaining unpaid on said certificate of purchase, on the said 26th day of August, 1871, with the proper interest thereon to this date, amounts to the sum of four hundred and seventy-six dollars, and the said other judgments against said plaintiff, with the interest thereon, amount to six hundred and two dollars, making the aggregate the sum of one thousand and seventy-eight dollars.

"And these were all the facts involved in the case, as shown by the evidence."

The following are "the conclusions of law involved in the trial," as made in writing by the court:

"1st. That the said sheriff's sale was regular and valid, and the purchaser or his assign would have been entitled to a deed for said real estate, at the expiration of one year from the date of such sale, if no legal redemption had been made, or no agreement or transaction, changing the rights of the parties, had occurred.

"2d. That the legal effect of said agreement, made between the said Calloway and Raresheid and said plaintiff, and the payment by plaintiff of the said four hundred dollars thereunder, was to destroy the rights of the former to a conveyance under and by virtue of said sale, and to restrict their rights under said certificate of sale, to the enforcement of a lien upon said real estate, to the extent of the said unpaid balance, reserving to the plaintiff the right to redeem therefrom at any time before foreclosure, upon the payment of the said balance, with proper interest thereon. But that equity would forbid the exercise of such right of redemption, unless the plaintiff should also pay the said amount of the said judgment, which he so agreed to pay, and from which he and the said real estate were relieved.

"3d. That the defendant, before he received his deed or paid the purchase-money, had sufficient information touching such agreement and payment, to put him upon inquiry concerning the same, and he is legally chargeable with notice of the terms and conditions thereof, and that the plaintiff, therefore, has the same rights in the premises, or against the defendant, that he did have or might have, as against the said Raresheid and Calloway.

"4th. That the said sheriff's deed ought to be set aside and held for naught, and the said real estate redeemed and free from said sheriff's sale, upon the prompt payment, by plaintiff to defendant, of the said sum of one thousand and seventy-eight dollars, in the aggregate. And,

Spath v. Hankins.

inasmuch as no demand is shown to have been made by the plaintiff of the defendant, before the commencement of this suit, for a reconveyance of said real estate, nor any offer or tender by him of the said amount required to redeem the same, the plaintiff is not entitled to recover costs in this action."

The defendant moved for a judgment in his favor, upon the facts as found by the court, which motion was overruled. To the "decision of the court upon the questions of law involved in the trial," the defendant objected and excepted. The defendant then filed a motion for a new trial. This motion was overruled. A judgment and decree were rendered for the appellee, carrying into effect the findings of facts and conclusions of law of the court.

The merits of this case are shown by the following facts:

On the 27th of August, 1870, Alfred Hankins, the appellee, was the owner of two hundred acres of land, in Wayne county, Indiana, the lowest estimated value of which was ten thousand dollars. On that day it was encumbered by judgment liens, to the amount of about twelve hundred dollars, one of which, being the junior, was held by William J. Hankins; and on this lien, on the 27th of August, 1870, the two hundred acres of land were sold by the sheriff, to said W. J. Hankins, the judgment plaintiff, for seven hundred and twenty-two dollars and sixty-three cents, the amount of his judgment and costs, subject to prior judgment liens of five hundred dollars, less one. Said Hankins received from the sheriff a certificate of purchase.

On the 26th day of August, 1871, the last day of the year for redemption of the land, Hankins assigned his certificate of purchase to Calloway and Raresheid, the holders of the prior liens upon the land. On that day, an oral agreement was made between Calloway and Raresheid, of the one part, and Alfred Hankins, appellee, of the other part, that the latter should then and

Spath v. Hankins.

there pay Calloway and Raresheid, on account of the redemption of said real estate, the sum of four hundred dollars, and should, within three weeks, pay the balance of the redemption money, viz., three hundred and ninety-four dollars and thirty-four cents, and, in addition thereto, the amount of the prior judgment liens on said land, held by Calloway and Raresheid, viz., five hundred dollars, both of said sums being added together, making, in the aggregate, the sum of about nine hundred dollars; this sum to be paid, as has been said, within three weeks, as a condition precedent to redemption; and further, it was made a condition in the agreement, that, if appellee failed to pay said nine hundred dollars within the three weeks, he should forfeit the four hundred dollars paid, and his right to redeem the land should become extinct. Upon this agreement, appellee paid the four hundred dollars towards the redemption of the land, leaving about nine hundred dollars, less than one-tenth of its value, as the entire sum required to clear the farm of all encumbrance; and for which small sum, if redemption failed, the assignees of the execution plaintiff would get the farm. But, notwithstanding this agreement for three weeks' time for redemption, Calloway and Raresheid, within two days after it was made, obtained a deed from the sheriff, to the land, and subsequently conveyed the same, by a quit-claim deed, to the appellant, Spath. At the expiration of the three weeks, appellee had procured but a part of the balance of the money required, and asked for three days more time, but it was denied him; and, subsequently, he brought this suit to redeem, and, as we have seen, succeeded below.

In *Hughart v. Lenburg*, 45 Ind. 498, this court decided, that, "Where, within the year allowed by statute for the redemption of land sold on execution, the purchaser accepts a part of the redemption money, on the promise of the execution debtor to pay the residue within the year, he waives his right to hold the land as a purchaser,

Spath v. Hankins.

and the debtor may complete the redemption after the expiration of the year. In such case, the purchaser holds the land under the sheriff's deed merely as a security for the remainder of the redemption money."

In the case now before the court, the purchaser accepted four hundred dollars, a part of the redemption money, within the year, on the promise of the debtor to pay the residue after the expiration of the year, which, we think, makes as strong a case, if not a stronger, in favor of the debtor's right of subsequent redemption, than was created in the *Hughart* case, *supra*.

The four hundred dollars, in this, as in that, case, was paid toward the redemption of the land, and so accepted; it was paid within the year, so that the redemption was begun within the year, as in the *Hughart* case; but it is said the payment in this case was upon a special agreement, as to time of paying the balance, with the addition of all other liens, under forfeiture of all rights, on failure to pay the aggregate of such sums, at the day, etc. This is true; but the agreement was one so unconscionable that no court of equity would give effect to it; and was evidently imposed upon the appellee with the design and purpose to get from him the additional four hundred dollars and the land, while still holding the appellee personally liable to pay the amount of the judgment liens prior to the one on which the sheriff's sale took place. Taking advantage of appellee's embarrassed condition, Calloway and Raresheid made the time for redemption so short, and the amount so large, by, perhaps illegally, adding to the redemption money the five hundred dollars, then well secured on the land, that it would hardly be possible that the amount could be raised, and rendering it almost a certainty that the forfeiture must take place. That they so understood it, is evident from the fact, that, within two or three days after they had agreed to extend the time for redemption to appellee for three weeks, they

Spath v. Hankins.

procured the sheriff's deed, upon the certificate of sale, to themselves.

We said above that the five hundred dollars of prior liens was perhaps illegally added in the contract made touching the redemption. Such consequence, perhaps, results from the fact that when a part of the redemption money is paid, the debtor has a legal right to complete the redemption afterwards, by paying, with the sum previously paid, the amount required by statute to redeem. But this we do not decide.

The obstacle supposed to be placed in the way of redemption, by the special contract, being shown to have no existence, the case falls within *Hughart v. Lenburg*, *supra*, and is governed by it. But, were that contract regarded as valid, it would present no obstacle to the redemption sought in this case, where the appellee offers now to pay the whole amount named in the contract, if required, unless time is of the essence of that contract. No circumstances indicate that time, in the equitable sense of the term, is of the essence of that contract; but it is claimed that the parties have made it so by the contract.

In *Richmond v. Robinson*, 12 Mich. 193, it is decided, that "time can not be made essential in a contract merely by so declaring, if it would be unconscionable to allow it" to be so. We have seen that it would be in this case. And we do not have occasion here, we may remark, to determine the question, whether that contract is void by the statute of frauds.

The bill of exceptions shows that the evidence was heard at the November term of the court, and then continued until the February term for argument. That, at the February term, immediately before the argument began, the plaintiff asked for and obtained leave to amend each paragraph of his complaint by inserting therein the following words:

"The plaintiff is ready and willing and offers to pay

Coyner v. Boyd et al.

the residue of said redemption money, and the balance due on said judgment in favor of William J. Hankins, and all costs and expenses connected therewith, to whomsoever may be entitled thereto; and the plaintiff also offers to pay whatever sum shall be found due from him, in order to redeem said premises, upon an account being taken by the court, or which the court shall find to be in arrears, and that he may be allowed to redeem."

The complaint contained a full statement of the facts, and prayed for the setting aside of the sheriff's deed; evidence was heard on the whole case, and we do not see that the defendant could be harmed by the amendment. It made the complaint formally, as well as substantially, sufficient. *Green v. Tanner*, 8 Met. 411; *Kemp v. Mitchell*, 36 Ind. 249.

We think the complaint, as amended, was sufficient, and that the court did not err in allowing the amendment.

We think the plaintiff is shown to have sufficient interest in the subject-matter of the suit, to entitle him to maintain it.

It seems to the court that, in the language of sec. 580, 2 R. S. 1876, p. 246, it does appear that "the merits of the cause have been fairly tried and determined in the court below," and, hence, that the judgment should not be reversed, but affirmed.

Affirmed, with costs.



55	166
133	597
55	166
134	265
55	166
137	298
55	166
143	150
143	178
55	166
155	656
55	166
171	717

COYNER v. BOYD ET AL.

HIGHWAY.—*Petition for.*—*Appeal to Circuit Court.*—*Evidence.*—*Instruction to Jury.*—*Report of Viewers.*—Where, from the order of a board of commissioners locating a highway, a remonstrant has appealed to the circuit court, the cause there stands for trial, *de novo*; and neither the reports of

Coyner v. Boyd et al.

the viewers and reviewers appointed by such board to view the location of the proposed highway, nor a certified copy of the same, are competent evidence on such trial; and the action of such court in admitting, and in instructing a jury trying such cause to regard, them as evidence is erroneous.

SAME.—Practice.—Trial.—View of Proposed Route by the Jury.—During the trial of such cause in the circuit court, by a jury, the court may, where damages are claimed by the remonstrant, under the 328th section of the practice act, (2 R. S. 1876, p. 169,) allow such jury to view the route of the proposed highway.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

J. C. Suit, for appellees.

WORDEN, C. J.—The appellees filed a petition before the board of commissioners of Clinton county, praying for the laying out of a new highway, and viewers were appointed to examine and report upon the same, who reported in favor of the proposed highway.

The appellant, through whose land and enclosure of more than a year's standing the proposed road ran, remonstrated on the ground of the inutility of the proposed highway; also claiming damages, in case the same should be laid out as proposed. Reviewers were appointed, who also reported in favor of the road, and assessed the appellant's damages at fifty dollars. The board ordered the highway to be laid out and established, upon the payment of the damages assessed.

Coyner appealed to the circuit court, where the cause was tried by a jury, who returned a verdict to the effect that the proposed road was of public utility, and that it would pass through an enclosure of more than a year's standing, the consent of the owner of which could not be obtained, (meaning, we may suppose, the appellant,) but that a good way could not otherwise be had, and assessing the appellant's damages at the same amount as had been assessed by the reviewers. The verdict also found that the road was of sufficient public utility to justify the payment of the damages out of the county treasury.

Coyner v. Boyd et al.

The appellant moved for a new trial, and filed his written causes therefor, but his motion was overruled, and judgment was rendered on the verdict. Exception.

On the trial of the cause, the petitioners for the road gave in evidence a transcript of the record of the proceedings before the board of commissioners, including the reports of the viewers and reviewers, and the court charged, amongst other things, as follows :

“The reports of viewers and reviewers are a very high order of evidence. The presumption is, that the board of commissioners selected the viewers because of their fitness and disinterestedness; and it is further presumed, that these viewers and reviewers did their duty. Yet, these presumptions may be overcome by oral testimony, and their opinions and reports may be overcome in the same way.”

This charge seems to us to have been clearly wrong.

The questions in issue on the appeal were questions of fact, such as, whether the proposed road was of public utility, whether it ran through the appellant's enclosure, etc., and whether he was entitled to damages, and, if so, how much? *Kemp v. Smith*, 7 Ind. 471.

Upon these questions, the reports of the viewers and reviewers were not, in our opinion, competent evidence at all. The reports of the viewers and reviewers were but the embodiment of the conclusions at which they had arrived. It was the province of the jury, in trying the cause on appeal, to determine the questions involved from competent evidence laid before them, and not from the conclusions of viewers or reviewers upon the same questions. As well might it be said that the verdict of a jury, on the trial of a cause before a justice of the peace, would be competent evidence to prove the facts of the case on the trial of the cause on appeal to the circuit court.

The charge was duly excepted to, and assigned as one of the causes for a new trial.

Brookbank v. The State, ex rel. Murphy.

We may add, that, where one's land is thus proposed to be taken for a highway, for which he claims damages, we see no reason why the jury, on the trial of the cause in the circuit court, may not have a view of the premises, if the court should be of opinion that it is proper, under the provisions of section 328 of the code. 2. R. S. 1876, p. 169.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

BROOKBANK v. THE STATE, EX REL. MURPHY.

SUPREME COURT.—*Practice.*—*Defective Record.*—*Improper Evidence.*—*Unavailable Error.*—Where the court trying a cause, over the objection and exception of a party thereto, permits an improper question to be put to and answered by a witness testifying therein, yet, if, on appeal to the Supreme Court, the record does not show what the answer was, such ruling is not available as error.

EVIDENCE.—*Witness.*—*Impeachment.*—*Contradictory Statements.*—*Sustaining a Witness.*—Where, on the trial of a cause, declarations by a witness, made out of court, contradicting testimony given by him in such cause, are given in evidence to impeach him, the party calling him may give evidence of other declarations, made by him out of court, in harmony with his testimony, for the purpose of supporting it.

SAME.—*What Declarations -- When Made.*—Evidence of declarations in harmony with the testimony of a witness is not limited to those made before the time when his declarations, given in evidence to impeach him, were made.

From the Fayette Circuit Court.

W. Morrow, N. Trusler, J. A. Henry, B. F. Claypool, J. C. McIntosh and W. C. Forrey, for appellant.

PERKINS, J.—Prosecution for bastardy. Trial by jury. Verdict that appellant was the father of the bastard child. Motion for a new trial denied. The overruling of the motion for a new trial is the only error alleged on appeal,

55	169
137	245
55	169
133	408
55	169
147	372
55	169
165	442

Brookbank v. The State, ex rel. Murphy.

in this court. And the only grounds upon which it is claimed that the court erred in this ruling are these:

"1st. Because the court permitted the following questions to be asked Ida Murphy, and answered by her, on her original examination, viz.:

"State whether or not the defendant gave you, after your pregnancy and before the birth of the child, any medicines, and, if so, when, and what? And what did he say to you, if any thing, on the subject?"

The answers to these questions, if any were given, are not in the bill of exceptions.

"2d. Because the court permitted the following questions to be asked Sarah Murphy, a witness for the defendant, upon her cross-examination by the plaintiff, the same not being responsive to any thing elicited in her first original examination, viz.:

"Did Flora leave your house without your knowledge or consent?"

No answer in the record.

"Have you made any inquiry as to her whereabouts since she went away?"

No answer in the record.

"Have you any knowledge or information where she is?"

No answer in the record.

"Do you know who took her away?"

No answer in the record.

"Have you any information as to who took her away?"

No answer in the record.

"3d. Because the defendant, on the trial of the cause, having, in his testimony in chief, introduced and read in evidence the deposition of one Ida McMinery, in which were the following questions and answers thereto, viz.:

"1. Where was your room during the time you were there (defendant's residence), and who roomed with you, if any one?

Brookbank v. The State, ex rel. Murphy.

“‘Answer. The room was in the north part of Mr. Brookbank’s house. Ida Murphy, the relatrix, roomed with me one week, up to the time she left:

“‘2. What was the condition of Ida Murphy at this time? And if you had any conversation with her, state what it was:

“‘Answer. She was in the family way; I noticed it on her, and she asked me if I knew what she could do to get rid of it; I told her I did not; she told me it was not Mr. Brookbank’s; she said it was Thomas Hawkins’:

“‘3. State whether or not you asked her, in that conversation, whose child it was:

“‘Answer. Yes, sir; she said it was Thomas Hawkins’:

“And the said Ida having, on her cross-examination by the defendant, testified that she did, on the morning that she left the house of the defendant, tell defendant’s wife that ‘Shorty’ (meaning one Charles Bedford) was the father of her child, but that the defendant had, in a conversation with her, that morning, urged her to tell his wife, when the latter questioned her, that it was ‘Shorty’s,’ and he would pay her all she could get if she charged it to him, defendant, to rebut which, the plaintiff, afterwards, in her rebutting evidence, introduced as a witness, one Catherine Hawkins, and propounded to her the following interrogatory:

“‘State what, if any thing, Ida Murphy, the relatrix, said to you after her return home, as to the paternity of her child.’

“To the propounding and the answering of which question the defendant, at the time, objected, for the reason that the same was illegal and incompetent; and for the further reason that the statement in answer thereto, introduced [intended] to be elicited, was after the statement made to the said Ida McMinery as to the paternity of her child, and only a few days before this prosecution commenced before the justice of the peace, and the same day

Brookbank v. The State, ex rel. Murphy.

Ida left Brookbank's house; but the court overruled said objection, and permitted said witness to answer the same to the jury, which she did, as follows:

“‘Ida came home the last of May or first of June; she came and stayed with me all night; and on the night of the day she left Brookbank's, (defendant's) I had a conversation with her; I can not remember all the conversation; she said it was Charles Brookbank's child, and that she had been ruined forever.’”

As to the first and second reasons assigned below as grounds for a new trial, this court can not say that the appellant was injured by the questions and answers of the witness, as we are ignorant as to what the answers were. They may have been favorable to the appellant. And if they were not injurious to him, the statute forbids the reversal of the judgment because they were erroneously, even, permitted to go to the jury.

As to the third reason assigned below for a new trial, it seems to us the cases of *Coffin v. Anderson*, 4 Blackf. 895, and *Dailey v. The State, ex rel., etc.*, 28 Ind. 285, justify the ruling made. In the latter case it is said:

“The law has been long established in this State, that if statements of the witness made out of court are introduced on the trial, which are in conflict with his testimony, to discredit him, he may prove his declarations made in harmony with his evidence. *Coffin v. Anderson*, 4 Blackf. 895.”

Neither of the above cases limits the proof of “his declarations made in harmony with his evidence,” to the part of them made prior to those given in evidence for the purpose of impeaching. It is admitted in *Coffin v. Anderson, supra*, that the English rule is probably the other way; but the Supreme Court of this State has adhered to the rule as laid down in the cases cited.

The judgment is affirmed, with costs.

 Reid et al. v. Huston, Adm'r.

REID ET AL. v. HUSTON, ADM'R.

55	173
131	349

PLEADING.—*Partial Answer Pleaded to Whole Complaint.*—An answer which, in legal effect, goes to but a part of the complaint to which it is pleaded, is bad on demurrer for want of sufficient facts, when pleaded to the whole.

SAME.—*Former Adjudication.*—Where, to a complaint upon a promissory note, the defendant pleads, by way of counter-claim, that he has been defrauded and damaged by the plaintiff in the execution of a bond given in the course of the same business transaction in which the note in suit was executed, and such matter of counter-claim was set up in a suit upon such bond, it is *res adjudicata*, and can not be set up against such note.

SAME.—*Fraud.*—*Waiver.*—Fraud in the execution of a written instrument, alleged to have damaged the makers thereof, is waived by the giving of a promissory note, thereafter, in settlement of the same business transaction in which such bond was given, and in suit upon such note, five years after the execution of such bond, such fraud constitutes no defence.

From the Fayette Circuit Court.

W. Morrow, N. Trusler, J. M. Wilson and A. M. Sinks,
for appellants.

J. C. McIntosh, for appellee.

BIDDLE, J.—Suit on a promissory note for four thousand five hundred dollars, made by John S. Reid, Robert Marks and Jephtha Stelle, payable twelve months after date, to James and William Huston, waiving, etc., and dated the 15th of April, 1867. The action was commenced by William Huston, surviving partner of the payees; but this appeal is prosecuted against the appellee, who is the administrator of his estate.

We need not state the proceedings which resulted in a judgment for the appellee upon the note.

Only two questions are presented in the record:

1st. Upon the third paragraph of the separate answer of Robert Marks, which alleges,

“That the note mentioned in said complaint was given by said defendants in said cause, for a three-fourth’s interest in The Connersville Provision Store, and upon a partial

Reid et al. v. Huston, Adm'r.

settlement of the business of said store [with?] the plaintiff, and his deceased partner, James Huston, being one-fourth owner of said store; and that, at and before the time of the execution of said note, this defendant had advanced to said plaintiff the sum of five hundred dollars, which should have been allowed, but was, by mistake, not settled or allowed, and that said note should have been for three thousand five hundred dollars, instead of four thousand five hundred dollars, wherefore," etc.

To this paragraph a demurrer, alleging as ground the want of facts, was very properly sustained. It is pleaded to the whole complaint, and answers only as to five hundred dollars. The appellants insist that it is pleaded only as to the five hundred dollars, and is, therefore, as to that amount, good. They are mistaken.

2d. What the appellants call an answer by Robert Marks and Jephtha Stelle, but which, if anything, is a counter-claim, was also met by a demurrer alleging a want of facts, which demurrer was also sustained. It sets out an indemnifying bond, executed by the makers of the note sued on and W. J. Davis, their co-obligor, reciting the purchase of the provision store by the makers of the note, from the Hustons, and the terms of the agreement, conditioned that they will save the Hustons harmless against paying three-fourths of the debts of the store, or any part of the same, which they had agreed to pay when they purchased the store from the Hustons.

We are saved from any elaborate examination of the question raised upon this counter-claim, by the decision of this court in the case of *Davis v. Fearis*, 52 Ind. 128. That was an action brought by the executors of James Huston, deceased, founded on the same bond, against the present appellants and their co-obligor, Davis, against which they alleged substantially the same facts—indeed, quite literally the same—as those alleged against the validity of the bond in the present case. The allegations against the bond were held insufficient then, and we must

Cronkhite v. Johnson.

hold them insufficient now; indeed, we regard the matters as *res adjudicata* between the parties. To the reasons given, however, in the case cited, why that answer was insufficient, may be added, against this counter-claim, that the allegations of fraud in procuring the bond are contradicted by the bond itself, namely,—that the averment that Huston represented that the store owed no debts, when the bond was given to indemnify him against the debts of the store,—besides, the note was executed nearly two years after they had bought three-fourths of the store and given the bond, and more than five years before the fraud was attempted to be set up in the present action. In the case *supra*, these allegations were set up as an answer to a suit on the bond; in this case they are set up in a counter-claim, asking relief against the note. They are insufficient in both cases.

The judgment is affirmed, with costs and two per cent. damages.

CRONKHITE v. JOHNSON.

NEW TRIAL.—Cause.—Master Commissioner.—Report.—Where judgment is rendered in a cause, upon the report of a master commissioner to whom it was referred, material error in such report is good ground for a new trial.

From the Warren Circuit Court.

G. O. Behm, J. Park and A. O. Behm, for appellant.

J. M. LaRue and W. P. Rhodes, for appellee.

WORDEN, C. J.—This was an action by the appellant, against the appellee, involving matters of account between the parties, growing out of partnership transactions.

The cause was referred to a master commissioner, who

Ex Parte Jones et al.

reported a balance in favor of the defendant, against the plaintiff, of the sum of one hundred and twenty-four dollars and fourteen cents, and also the evidence in the cause.

The plaintiff filed exceptions to the report of the master, but they were overruled. Exception.

After an unsuccessful motion, made by the plaintiff, for a new trial, judgment was rendered for the defendant, for the amount so reported to be due to him.

We are of opinion, from an examination of the evidence, and the statement of the accounts between the parties, as reported by the master, that material errors against the appellant occurred in the statement of the accounts, and that the exceptions to the report should have been sustained, and a new trial granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial

EX PARTE JONES ET AL.

55	176
134	111
55	176
137	93
55	176
147	29

CRIMINAL LAW.—*Habeas Corpus.*—*Bail.*—*Murder.*—Where a defendant is confined in jail upon an indictment for murder, he is entitled to be admitted to bail, on petition therefor, upon showing either that the proof of his guilt is not evident, or, that the presumption of his guilt is not strong.

SAME.—*Burden of Proof.*—Upon the hearing of such petition, the burden of proof is upon the defendant.

SAME.—*Presumption.*—Upon the hearing of such petition, the presumption of law is against, not in favor of, the defendant's right to be admitted to bail.

From the Monroe Circuit Court.

C. F. McNutt, J. W. Tucker, G. O. Iseminger, J. W. Gordon, W. C. Lamb and S. M. Shepard, for appellants.

R. W. Miers, G. W. Friedley and C. A. Buskirk, Attorney General, for the State.

Ex Parte Jones et al.

Howk, J.—At the November term, 1876, of the court below, Alonzo B. Jones, Lee Jones and Milton P. Toliver, the appellants, and one Thomas Toliver filed their petition or complaint, duly signed and verified, praying therein for the issue of the writ of *habeas corpus*, in their behalf.

In their petition the said petitioners alleged, in substance, that they were then, each and all, restrained of their liberty by Williamson M. Alexander, sheriff and jailer of Monroe county, Indiana; that they were so restrained of their liberty in the common jail of said county, in the city of Bloomington, in said Monroe county; that they were so restrained of their liberty, by said sheriff and jailer, in said jail, upon a charge of having, on the 2d day of March, 1875, at the county of Orange, Indiana, feloniously, purposely and with premeditated malice, unlawfully killed and murdered Thomas Moody, by shooting him, the said Moody, the said charge being preferred upon an indictment returned by the grand jury of said Orange county; that they are not, nor is either of them, guilty of said crime so charged, and that they had been committed to said jail, without bail or the right to bail, when, in truth and in fact, the proof against them was not evident, nor the presumption of their guilt strong, nor was the proof against any of them evident, nor the presumption strong. Wherefore, they and each of them prayed the court below, that a writ of *habeas corpus*, in their behalf, might be issued to said sheriff and jailer, and that they might have a hearing thereon as to whether they ought to be admitted to bail, and that, upon such hearing, they might be adjudged to be entitled to bail, and for all other proper relief.

Upon the filing of said verified petition, by the order of the court below thereon, a writ of *habeas corpus* was duly issued to the sheriff and jailer of said Monroe county, commanding him to have the bodies of said peti-

Ex Parte Jones et al.

tioners before the judge of said court, on the 11th day of December, 1876, at the court-house of said county, in Bloomington, to do and receive what should be ordered concerning them. At the time and place named in said writ, the said sheriff and jailer made return thereof in writing, in substance, that he had the bodies of the said petitioners in court, and that the authority by which he held them was an order of the Orange circuit court, made in the case of the State of Indiana against the said petitioners, on an indictment for murder in the first degree, changing the venue of said case to said Monroe county, and a copy of said indictment and orders and proceedings of said Orange circuit court, and of the Monroe circuit court, in said cause, were filed with and made part of said return to said writ.

The copy filed with said return showed the truth of the sheriff's return, and that the petitioners were lawfully in his custody, under an indictment for murder in the first degree, duly and legally found in the Orange circuit court, against said petitioners and one Eli Lowery. Upon this return, a hearing was had by the court below. And this hearing resulted in the finding and judgment of the court below, that said Thomas Toliver was entitled to and should be admitted to bail, in the sum of twenty thousand dollars, and that the appellants were not entitled to bail, and should stand committed, without bail or right of bail, to await their final trial; to which finding and judgment appellants severally excepted.

Thereupon the appellants moved the court below, in writing, for a new trial or hearing of their said petition, for the reason that the finding and judgment of the court, in refusing them the right to bail, was contrary to law and the evidence. This motion was overruled, and to this decision appellants excepted. The evidence before the court below, upon the hearing of this cause, is properly in the record.

Ex Parte Jones et al.

In this court, the appellants have assigned the following alleged errors:

1st. The court below erred in refusing to admit said appellants to bail, there being no evident proof nor strong presumption of their guilt, as charged in the indictment, of murder, or of any other non-bailable crime;

2d. The court erred in refusing to grant the appellants a new trial, as moved by them.

In our opinion, the real question presented for our consideration, by the record of this cause, and by appellants' assignment of errors thereon, is this:

Are the finding and decision of the court below sustained by sufficient evidence?

The appellants do not complain of any errors of law, occurring at the hearing. But the only question submitted for our decision is purely a question of fact.

By the 17th section of the bill of rights, in our State constitution, it is provided as follows:

"Sec. 17. Offences, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." 1 R. S. 1876, p. 23.

It will be observed from the language of this section, that, as a general rule, murder and treason shall not be bailable; but, by a fair and logical construction of the language used, it may be well said that either murder or treason shall be bailable, in either one of two cases:

1st. When the proof is not evident;

2d. When the presumption is not strong.

In either one of these two separate and distinct cases, the offence shall be bailable. When, however, the proof is evident, or when the presumption is strong, of the guilt of the accused of either murder or treason, then, in either case, the provision of the section, cited from the bill of rights, is, that the offence shall not be bailable.

In the petition filed in this cause, in the court below, the appellants alleged, as matters of fact:

Ex Parte Jones et al.

1st. That the proof of the guilt of any of them, of the felony whereof they were charged, was not evident; and,

2d. That the presumption of the guilt of any of them, of said felony, was not strong.

Upon the truth of these two allegations in their petition, the appellants have founded and still found their right to bail. In this cause, no presumption of law exists in favor of the appellants' right to bail. An indictment for murder, duly returned, implies, *prima facie*, that the parties indicted have no right to bail. This is so, even where the indictment is for murder in the second degree. *Ex parte Colter*, 35 Ind. 109.

When, therefore, the appellants filed their petition in the court below, praying, for the causes therein alleged, that they might be admitted to bail, they assumed the burden of showing, by the evidence, that the proof of their guilt was not evident, and that the presumption of their guilt was not strong. *Ex parte Heffren*, 27 Ind. 87.

The evidence in this cause is exceedingly long and voluminous. The questions presented by the record have been ably and elaborately discussed before us, by counsel learned in the law and skilled in legal argument. We have examined the evidence, and we have heard and considered the arguments of counsel, both oral and written, with that degree of care and patience, which, we think, the importance of the case demands at our hands. And our conclusion is, that this court ought not to disturb the finding and judgment of the court below, committing the appellants to jail, without bail or the right of bail, to await their final trial.

The judgment is affirmed, at the costs of the appellants.

Backes v. Dant.

BACKES v. DANT.

LIQUOR LAW OF 1873.—Intoxication.—Death of Husband.—Action by Widow.

—Under section 12 of the act of February 27th, 1873, (Acts 1873, Reg. Sess., p. 151,) regulating the sale of intoxicating liquors, etc., the widow of a deceased person, who came to his death as the result of injuries received by him from a fall whilst intoxicated, could not maintain an action for damages therefor, against a person who had unlawfully sold her deceased husband intoxicating liquor which had caused such intoxication.

SAME.—Repeal of Statute —Statute Construed.—Supreme Court.—Appeal.—The repeal of such statute by the act of March 17th, 1875, (1 R. S. 1876, p. 869,) did not take away the right of a subsequent appeal to the Supreme Court, by a party to a cause accruing under the former law, wherein a judgment had been rendered against him, prior to such repeal; such action being a suit pending, within the proviso of section 21 of the latter act.

SAME.—Where a cause of action accrues under one statute, and the right of appeal to the Supreme Court from a judgment therein rendered lies under another, even the unqualified repeal of the former statute does not deprive the defendant of such right of appeal.

From the Daviess Circuit Court.

J. T. Pierce, for appellant.

J. W. Burton and *W. D. Bynum*, for appellee.

WORDEN, J.—Action by the appellee against the appellant, the complaint alleging, in substance, that the defendant unlawfully sold to the plaintiff's former husband intoxicating liquor, whereby he became drunk, in consequence of which he fell down a flight of stairs, inflicting injuries upon himself, of which he died. The complaint was founded upon the 12th section of what is generally known as the "Baxter Bill."

Demurrer to the complaint for want of sufficient facts, overruled, and exception.

Such further proceedings were had as that final judgment was rendered for the plaintiff below.

The defendant appeals to this court.

The appellee has filed a written motion to dismiss the appeal, because it was not taken until after the repeal of the "Baxter Bill." The 21st section of the act to regulate and license the sale of spirituous, etc., liquors, etc., ap-

Backes v. Dant.

proved March 17th 1875, 1 R. S. 1876, p. 869, repeals all former laws regulating the sale of intoxicating liquors, and all laws coming in conflict with any of the provisions of that act; "*Provided, however, That nothing herein contained shall be so construed as to affect in any way suits or indictments now pending in any of the courts of this State under the provisions of any of the laws hereby repealed, and the same shall be tried and determined as though this act had not been passed.*"

It is claimed by counsel for the appellee, as we understand their brief, that, as this appeal had not been taken when the "Baxter Bill" was repealed, as above shown, the case cannot be regarded as a suit pending when the repeal took effect, and, therefore, that the appeal to this court does not lie.

The conclusion does not follow the premises, though the premises can not, probably, be conceded.

If the plaintiff had been beaten below, and had appealed to this court after the repeal of the law on which the action was founded, seeking a reversal in order to obtain another trial of the cause below, it would seem that the case ought to be regarded as a suit pending, until finally disposed of, and, if reversed in this court, that the plaintiff could go on with it below, the case being within the saving clause of the repealing statute.

But, however that might be, the appeal in this case is clearly well taken. The plaintiff recovered in the court below. If she has obtained a wrong judgment, under the law, the repeal of the law does not make it right, or take away the defendant's right of appeal, which is given by another statute not repealed.

The defendant's right of appeal does not depend upon any saving clause in the repealing act.

His right of appeal would have been perfect if the "Baxter Bill" had been unqualifiedly repealed.

To state the case simply:—A plaintiff obtains a judgment, under the provisions of a statute. The defendant

Roe v. Cronkhite et al., Adm'rs.

claims that the statute does not authorize the judgment, and, therefore, that it is erroneous. The repeal of the statute can in no manner affect the defendant's right to appeal, and thereby test the question whether the judgment was rightfully rendered.

The appellant has assigned for error the overruling of his demurrer to the complaint.

The demurrer should have been sustained. The case comes within the ruling of this court in the cases of *Krach v. Heilman*, 53 Ind. 517, and *Collier v. Early*, 54 Ind. 559, at the present term.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

ROE v. CRONKHITE ET AL., ADM'RS.

NEW TRIAL.—Cause.—Verdict.—Where the jury trying a cause, in the face of uncontradicted evidence, returns a verdict contrary thereto, such verdict should be set aside, and a new trial granted.

From the Warren Circuit Court.

M. Milford, for appellant.

Howk, J.—The appellees, as plaintiffs, sued the appellant, as defendant, in the court below. Appellees' complaint was in two paragraphs. The first paragraph counted upon a promissory note, executed by appellant to appellees' intestate, and alleged to remain unpaid. The second paragraph of the complaint alleged an indebtedness by the appellant to the estate of appellees' decedent, for goods purchased by appellant from said decedent, in his lifetime, a bill of particulars of which was filed with and made part of said paragraph, and that said indebtedness was due and unpaid.

Roe v. Cronkhite et al., Adm'rs.

To this complaint, the appellant answered in two paragraphs:

1st. A general denial;

2d. The appellant averred, that appellees' intestate was, in his lifetime, and his estate then was, indebted to appellant in the sum of, to wit, three thousand dollars, for money and goods furnished to said decedent, in his lifetime, by the appellant, at said decedent's request, the items of which were set out in said paragraph, and that all of said sums remained unpaid; and the appellant offered to set off against the amount due the appellees, if any thing, an amount equal thereto, and demanded judgment for the residue.

To the second paragraph of appellant's answer, the appellees replied by a general denial.

The action being at issue was tried by a jury, in the court below, and a verdict was returned for the appellees, in the sum of two hundred and seventy dollars. The appellant, upon written causes filed, moved the court below for a new trial, which motion was overruled by the court, and to this decision the appellant excepted. And the judgment was then rendered on the verdict, from which this appeal is now prosecuted.

In this court, the only alleged error assigned by the appellant is the decision of the court below, in overruling his motion for a new trial.

The causes assigned by appellant, in his motion for a new trial, were as follows:

1st. The verdict of the jury was contrary to law;

2d. The verdict of the jury was not sustained by sufficient evidence; and,

3d. The verdict of the jury was contrary to the law and the evidence.

We can readily understand how a jury, trying a cause, may often be induced to return a verdict that is palpably wrong; but why, in such a case, the court in which the cause is tried should overrule a motion for a new trial, it

Markle et al. v. The Board, etc., of Clay County et al.

is sometimes difficult, as it is in this case, for us to comprehend. The verdict in this case may possibly have been right, but certainly the evidence in the record wholly fails to sustain it. There was no conflict in the evidence, as neither party, apparently, attempted to contradict any evidence introduced by the other party. The appellees gave in evidence the note sued on in the first paragraph, and proved a very small portion of the account sued on in the second paragraph of their complaint, and rested. On the other hand, the appellant proved almost all of his set-off, and rested. And this was all the evidence in the record. Under this evidence, the appellant was clearly entitled to a verdict of about one thousand dollars, in his favor, instead of the verdict rendered against him.

The appellees have filed no brief in this court, in support of the verdict they obtained in the court below, or in support of the decision of that court, overruling appellant's motion for a new trial. We are unable to conjecture any grounds, upon which the decision of the court below can or ought to be sustained.

In our opinion, the court below erred in overruling appellant's motion for a new trial, in this action, and for this error the judgment of that court must be reversed.

Judgment reversed at appellees' costs, and cause remanded, with instructions to grant a new trial, and for further proceedings.

MARKLE ET AL. v. THE BOARD, ETC., OF CLAY COUNTY ET AL.

COUNTY COMMISSIONERS.—*Relocating County Seat.—Fraud.—Injunction.—*
Fraud consummated in and by the final order of a board of commissioners, relocating the county seat and directing the erection of a new court-

Markle et al. v. The Board, etc., of Clay County et al.

house and jail, practised upon such board by the petitioners for such order, is sufficient ground to sustain an independent proceeding in the circuit court to procure an injunction against such board, restraining them from carrying out such order.

SAME.—Fraud, in such proceedings, practised upon such board, by such petitioners, in the procuring of fraudulent signatures to the petition for such order, or in any other matter which might have been contested before such board, during the pendency of such petition, is not ground sufficient to obtain such injunction.

SAME.—*Pleading.*—Where an injunction in such cause is sought to be obtained on account of a fraud practised and consummated three years prior to the commencement of such action, if such delay be unexplained in the complaint, it is insufficient on demurrer.

SAME.—In an action to obtain such injunction the complaint must allege that such court-house and jail, the building of which is sought to be enjoined, have not already been erected.

From the Clay Circuit Court.

A. T. Rose, J. J. Stephenson, W. W. Carter and S. D. Coffey, for appellants.

E. W. Curtis, G. A. Knight and I. M. Compton, for appellees.

BIDDLE, J.—This case is the same as *The Board of Commissioners of Clay County v. Markle*, 46 Ind. 96, in which all the questions now presented were settled adversely to the appellants, except the allegation that the decision of the board was obtained by fraud. It is stated in the appellants' brief, that, "upon the return of the decision of the Supreme Court to the lower court, leave was given to amend the complaint, and an amended complaint was filed, in two paragraphs." This is the complaint now before us, but, from the transcript, it appears to be entirely a new case, and so we must treat it, for there is no part of the original proceedings in the circuit court before us in this case. A demurrer to the complaint, alleging the insufficiency of the facts charged, was sustained, and exceptions reserved.

The present complaint was filed April 12th, 1875. Its prayer is, to set aside the proceedings of the board of commissioners of Clay county, which were commenced in

Markle *et al.* v. The Board, etc., of Clay County *et al.*

September, 1871, to grant a perpetual injunction against the defendants, and that they and their successors in office be forever enjoined from relocating said county seat, or expending money in the erection of a court-house or county jail, and for general relief. The allegations of fraud in the complaint are, that the vendor had no title in the grounds conveyed to the board for the purposes of a court-house and jail; that the board refused to investigate the title to the lands, and were deceived therein; that the board refused to count the signatures to the petition upon which the proceedings were founded; that there were not the requisite number of signatures; that many of them were fictitious; that many of the signers were not citizens of the county; that the board, being ignorant of such facts, relied upon the false representations of the petitioners, and acted on their representations. Other various charges of fraud are made, but the facts alleged all existed before the final order of the board relocating the court-house and jail was made, all of which were open to contest, and some of which were contested, before the board, during the proceedings, and before the final order was made. Assuming that the fraud is sufficiently charged, and that the circuit court had jurisdiction and power to enjoin proceedings under an order of the board, for fraud, it could be done only for fraud practised on the board in procuring the order, and which was not consummated until the final order was made. It could not be done for fraud practised in the petition, nor in the land titles, nor for anything which existed before and could be contested in the proceedings while they were in *feri*, and before the final judgment thereon. If the appellants omitted their opportunity then,—their day in court—it is now too late to attack the proceedings collaterally. Besides, the proceeding now before us was commenced more than three years after the alleged fraud existed, without any explanation of the delay. Relief against fraud must be sought promptly, before the rights of inno-

Young v. Baxter.

cent parties intervene, or it will be denied. *Prettyman v. The Supervisors, etc.*, 19 Ill. 406. For anything shown in the present proceeding, the relocation of the county seat may have been accomplished, the court-house and jail built, and the work completed to the general satisfaction of the public, before the complaint was filed.

The demurrer to the complaint was properly sustained.

The judgment is affirmed, at the costs of the appellants.

YOUNG v. BAXTER.

FIXTURES.—Realty.—Personalty.—The fact that a stationary mill, belonging to two persons, jointly, has been placed upon and affixed to the real estate of one of them, for manufacturing purposes, under a temporary shed, the posts of which are let into the soil, does not constitute it part of such realty, if treated by such owners as personalty.

SAME.—Judgment Creditor.—The fact that such personalty was so attached to such realty, without the agreement of a judgment creditor, having a judgment lien upon such land, that it should be treated as personalty, will not give to the latter the right to treat it as a part of the realty, if it can be removed without injury thereto.

SAME.—Execution.—Exemption.—What May be Exempted.—In such case, where an execution against the owner of such real estate is levied thereon, he may demand that such realty be set off to him as exempt from execution, by an appraisement which will not include such mill property.

SAME.—Sheriff's Sale.—Mandate.—Appraisement.—Where, in such case, the sheriff holding such writ has caused such realty to be appraised, without including such mill property, and set off to such execution defendant, the execution plaintiff is not entitled to a writ of mandate to such sheriff, to compel him to have such realty so appraised as to include such mill property.

From the Clark Circuit Court.

M. C. Hester, for appellant.

Howk, J.—This was an application by appellant, upon affidavit and motion, to the court below, for a writ of

Young v. Baxter.

mandate to the appellee, as the sheriff of Clark county, Indiana. The cause was submitted to the court below for trial, upon the affidavits filed by the appellant; and the court made a finding in favor, in part, of the appellant, and, in part, of the appellee. Upon written causes filed, the appellant moved the court below for a new trial; which motion was overruled by the court, and to this decision appellant excepted. And a judgment was then rendered by the court below, upon its finding, from which this appeal is now prosecuted.

In this court, the appellant has assigned the following alleged errors:

1st. That the court below erred in overruling the appellant's motion for a new trial;

2d. That the court below erred in refusing the writ of mandate, as asked for by appellant.

These alleged errors present precisely the same question, for our consideration, and that is this:

Upon the facts stated in the affidavits filed by the appellant, was he entitled to the writ of mandate, asked for in his motion?

The facts stated in appellant's affidavit were, in substance, as follows:

On January 10th, 1865, one Henry W. Knotts recovered three several judgments, in the court of common pleas, of Clark county, Indiana, two against William Edmondson and John B. Rader, and the third against said John B. Rader, specifying the amount of each of said judgments; which said judgments were duly assigned by the said Knotts to the appellant, on February 17th, 1865; that at the last named date said Rader was, and ever since has been, the owner of a tract of land in said Clark county, particularly described in said affidavit, containing twenty acres; that about the year 1866, while said judgments were owned by appellant, and were liens on said real estate, and while said Rader owned and possessed said land, the said Rader erected thereon a stationary steam

Young v. Baxter.

saw-mill, including boiler, engine and machinery for running said mill, which said mill, boiler, engine and machinery were then and ever since have been attached and affixed to said land; that no agreement was ever made by appellant, or by any one in his behalf, and the said Rader, either before, at the time when, or since the said mill and machinery were so attached to said land, that the said mill, boiler, engine and machinery, or any part thereof, should be treated or held as personalty; that in November, 1874, there then being due on said judgments about one thousand seven hundred dollars, executions were duly issued out of the clerk's office of the court below, upon said judgments, and were placed in the hands of the appellee, who was then and still was the sheriff of said Clark county; that in said November, the appellee levied said executions upon said real estate, and caused the same to be advertised for sale; that before the day of sale, the said Rader demanded of the appellee, that said land be set off to him, said Rader, as exempt from execution, under and by virtue of the act, entitled "An act to exempt property from sale in certain cases," approved February 17th, 1852; that afterwards said Rader selected one George A. Edmondson, and appellant selected one John A. Boyer, to appraise said property, in accordance with the provisions of said act, and said appraisers, failing to agree upon the value of said property, selected one John W. Becket, as a third appraiser; that said Edmondson and Becket, against the protests of said Boyer and the appellant, failed and refused to include, in the valuation of said premises, the value of said boiler, engine and machinery, in the said mill, and expressly excepted said boiler, engine and machinery from the valuation placed by them upon said premises, and returned in their said appraisement only the value of said premises, exclusive of the value of said boiler, engine and mill machinery, notwithstanding the same were firmly attached and affixed to said land; and a copy of said

Young v. Baxter.

valuation, made by said Edmondson and Becket, was filed with and made part of said affidavit; and appellant further said, that said boiler, engine and mill machinery were of much greater value, as situated on said land, than they would have been, if detached and severed therefrom, and said land was of much greater value, with said boiler, engine and machinery thereon, than it would have been, if the same were removed therefrom; that there was then due and unpaid upon said judgments, and upon other judgments which appellant had against said Rader, and which were liens upon said land, more than one thousand dollars, and said Rader had no other property, as appellant was informed and believed, out of which any part of said judgments could be made. Appellant further said, that he was informed and believed, that said George A. Edmondson was not, when he made said appraisement, a disinterested householder, because he was a nephew of said Rader, and because he was at the time and still was a joint owner with said Rader, in said mill, boiler, engine and other machinery, subject to said liens of said judgments, of which interest and relationship appellant was ignorant at the time said appraisement was made. Appellant further said, that he had notified appellee of all said facts, and had requested him to have said premises reappraised by disinterested and competent appraisers, and to have said boiler, engine and mill machinery included in said appraisement, but the appellee had wholly failed and refused to cause the same to be reappraised by competent appraisers, and to have said boiler, engine and mill machinery included in said appraisement.

By the schedule and appraisement, which were made part of appellant's affidavit, the twenty acres of land, which had been levied upon by appellee as Rader's property and claimed by Rader as exempt from appellant's executions, were valued at fifteen dollars per acre, "excepting the boiler and engine and mill machinery."

Young v. Baxter.

Appellant also founded his motion, in part, upon, and gave in evidence, on the trial in the court below, an affidavit of one John C. Stuart. In this affidavit it was stated, in substance, that affiant was acquainted with said George A. Edmondson and John B. Rader; that said Edmondson had been, for not less than five years last past, a joint owner with said Rader in the mill, boiler, engine and other machinery therein, described in appellant's affidavit; that said mill was erected on said land, and said boiler, engine and machinery put therein by said Rader, in the years 1865 and 1866; that said mill building was of wood, the posts thereof set in the ground, the said boiler was set in a brick furnace, which brick furnace was built upon and in the said ground; and that the said engine and other machinery were firmly attached and affixed to the said building.

If the boiler, engine and mill machinery, mentioned in appellant's affidavit, had belonged to Rader, it would have made but little difference to the appellant whether they were considered and appraised as realty or as personalty. But as the boiler, engine and mill machinery did not belong to Rader, if the appellant could have succeeded in getting these articles, without reference to their ownership or to any agreement between their owners and Rader as the owner of the realty, considered and appraised as a part of Rader's real estate, then his chances for collecting his executions against Rader would have been very largely increased. If, as between Rader, as the owner of the real estate, and Rader & Edmondson, as the owners of the boiler, engine and mill machinery erected on said real estate, the said boiler, engine and mill machinery were treated and regarded as personal property,—then the articles named were personal property. *Pea v. Pea*, 35 Ind. 387; *Cromie v. Hoover*, 40 Ind. 49.

The mere fact that the appellant had judgments against the owner of the real estate, which were naked liens thereon, would not change the character of the property,

Young v. Baxter.

nor make the owner of the realty own more, and more valuable property, than he would own without those liens. The existence of appellant's liens on said real estate did not make it necessary that the owners of the boiler, engine and mill machinery should consult the appellant and get his consent to the erection of those articles on said real estate, or his agreement that the articles in question, when so erected, should be treated and regarded as personal property.

And besides, we may add, that the evidence failed to show that the boiler, engine and mill machinery could not be easily detached and readily removed, without any damage to the freehold and the mill building thereon. In fact, it is evident, from the description of the mill building, in Stuart's affidavit, that there was nothing permanent, or intended to be permanent, about the building in question. It was a mere shed, "the posts thereof set in the ground," and improperly termed a mill building. It is fairly inferrible from the evidence, that the mill in question could be readily removed from place to place, and be set up wherever the abundance of suitable timber and the demand for lumber might make its use profitable.

The 2d section of our exemption law authorized Rader to claim his exemption in either real or personal estate, whichever he might elect. 2 R. S. 1876, p. 354. And we think, that, in the case shown by this record, Rader had the right to elect and insist that his real estate should be appraised, without regard to any interest he might have in the boiler, engine and mill machinery situate thereon; and if his real estate, thus appraised, did not exceed in value the sum of three hundred dollars, he had the right, under the law, to claim such real estate as exempt from sale on execution, for any debt growing out of or founded upon contract. The appellant did not allege, nor show on the trial, that his judgments against Rader were not rendered on matters of contract. Of

 Holten v. The Board of Comm'rs of Lake County.

course, Rader having claimed and received his entire exemption in the real estate, as separate and distinct from the boiler, engine and machinery situate thereon, whatever interest the said Rader may have had in said boiler, engine and machinery, was subject to appellant's executions, and was liable to be sold thereunder, for the satisfaction thereof.

We find no error in the record of this cause.

The judgment of the court below is affirmed, at appellant's costs.

 HOLTEN V. THE BOARD OF COMM'RS OF LAKE COUNTY.

BOARD OF COMMISSIONERS.—Powers.—Poor Farm.—The board of commissioners of a county have a right, *prima facie*, to purchase a tract of land to be used as a home for the poor of their county, and such right can not be questioned in a collateral proceeding.

REAL ESTATE.—Action to Quiet Title.—Mortgage.—Pleading.—The purchaser of the equity of redemption of real estate which is encumbered by mortgage liens of different priorities, if he be in possession under such purchase, may maintain an action to quiet his title, against the holder of the junior mortgage, without alleging that he has paid off the senior.

SAME.—Equities of Different Liens.—Where, in such action, such purchaser had made valuable improvements and redeemed such realty from a judicial sale of the same under a decree foreclosing the senior mortgage, any rights which the holder of such junior mortgage may establish are subject to the equities of such purchaser, whether such foreclosure was, or was not, regular.

SAME.—Evidence.—Foreclosure.—Power of Attorney.—To establish an equity by such redemption, the plaintiff may introduce the record of a foreclosure of such senior mortgage by means of a power of attorney contained therein, or by a regular foreclosure suit, the sheriff's sale and deed thereunder, and the deed to the plaintiff from the sheriff's grantee.

SAME.—Practice.—Evidence.—Where, in such cause, the evidence shows that such junior mortgage is not a valid lien, the defendant can not complain of the introduction of improper evidence by the plaintiff in establishing his equities under such senior mortgage.

NEW TRIAL.—Practice.—Evidence.—Where improper evidence is admitted on the trial of a cause, without objection, its admission is not ground for a new trial.

55	194
141	554
55	194
145	318

Holten v. The Board of Comm'rs of Lake County.

EVIDENCE.—*Opinion of Witness.*—Where the value of property is an issue in a cause, any witness acquainted with such property may testify as to its value, stating, also, the facts upon which he bases his opinion

SAME.—*Insolvency.—Reputation.—Principal and Surety.*—Evidence offered, of the reputation of a principal debtor, as to his solvency or insolvency, is incompetent to show whether or not he had paid a debt for which another was surety.

SAME.—*Principal and Agent.—County.—Declarations of Agent.—Attorney.*—Declarations of the general attorney of a county that she would pay a certain debt are not admissible in a suit upon such claim, against such county.

SAME.—*Parol Evidence of Writing.*—Without accounting for the absence of a writing, parol evidence of its contents is inadmissible.

SAME.—Because it is "the original" is no ground of objection to the admission, as evidence, of the original præcipe for an execution.

SUPREME COURT.—*Practice.*—Where a party to a suit goes into trial without requiring the opposite party to plead to the former's own pleading, he can not avail himself of such failure, on appeal to the Supreme Court.

From the Lake Circuit Court.

M. Wood, T. J. Wood, S. J. Anthony, D. Turpie and H. D. Pierce, for appellant.

E. C. Field, T. J. Merrifield and W. Johnston, for appellee.

PERKINS, J.—Suit by the appellee, against the appellant, to quiet title.

The first paragraph of the complaint alleges that the appellee was the owner, in possession, of the parcel of ground described in the complaint, and that appellant held a mortgage on the same, from Enos M. Cramer, appellee's grantor, which had been given without consideration, and constituted a cloud upon the title to said ground.

The second paragraph alleged the ownership of the appellee, the mortgage of appellant, that it was given to him as an indemnity, and that he had had nothing to pay, etc.

There were three other paragraphs, alleging title in appellee, the mortgage of appellant, and asking that it be removed as an encumbrance constituting a cloud on appellee's title.

Holten v. The Board of Comm'rs of Lake County.

The appellant answered the general denial, and a second paragraph, by way of counter-claim, setting up his said mortgage, averring its validity and non-payment, and that it amounted at present to eight thousand dollars; and further, that appellee had enjoyed the rents and profits, for years, of the ground, had committed waste, etc., and prayed for an accounting and a foreclosure of his mortgage, etc.

The appellee replied in general denial. There was a trial by the court, finding for the appellee, and against the appellant, on his counter-claim, and judgment and decree rendered, quieting the title of the appellee.

Holten, appellant, moved for a new trial, thirteen reasons therefor being assigned, which motion was overruled, and he appealed to this court.

There are twenty-eight assignments of error. Most of them would have been embraced in an assignment alleging that the court erred in overruling the motion for a new trial.

In the course of this opinion, we shall notice the material points made in the briefs of the appellant's attorneys, on which they rely as showing sufficient ground for the reversal of the judgment. It will enable us to distinguish more readily the material points made, and separate them from the immaterial, if we first present a summary of the leading facts in the case.

On the 17th of July, 1865, Enos M. Cramer deeded the tract of land described in the pleadings in the case, containing five hundred and sixty acres, to the board of commissioners of Lake county, who procured it for a home for the county poor, a purpose for which, *prima facie*, they had power to purchase it. The board took possession, and made improvements of the value of several thousand dollars on the land. At the time of the purchase there were three mortgages on the tract of land, or part of it.

The first, to the State, dated April 28th, 1856, for five hundred dollars.

Holten v. The Board of Comm'rs of Lake County.

The second, dated August 4th, 1856, to Martin M. Kellogg, for about four thousand dollars.

The third, dated December 29th, 1857, to appellant, Holten, for four thousand dollars.

The mortgage to the State was foreclosed, under a power of attorney embraced in it, and the land conveyed by it sold to one Turner, in February, 1868, who paid the amount due on the mortgage, received a deed, and subsequently quit-claimed to the board of commissioners of Lake county, the appellee.

The second mortgage upon the property, that to Kellogg, was regularly foreclosed in court, the land purchased at sheriff's sale and paid for by one Crawford, who received a deed from the sheriff, and subsequently quit-claimed to the board of commissioners of Lake county.

In May, 1872, the board of commissioners commenced this suit against appellant, Holten, to quiet title against his mortgage, alleging that it had been paid, etc., as hereinbefore stated, in answer to which he set up his mortgage, asking its foreclosure, etc., as hereinbefore stated.

It was not necessary that the board of commissioners should have alleged that it had paid off the prior incumbrances, to enable it to maintain this suit to remove from the land the cloud upon its title, created by appellant's mortgage.

The title of the board, acquired by possession under the deed from Cramer, was amply sufficient for that purpose. *Doe v. West*, 1 Blackf. 133; *Robinoe v. Doe*, 6 Blackf. 85; *Shiel v. Ferriter*, 7 Blackf. 574; *Morss v. Doe*, 2 Ind. 65.

So far as the appellant is concerned, he is only interested in the questions arising out of the trial, upon his counter-claim. He never had any title to the land. He never had possession, and is not entitled to possession. He does not seek it by his counter-claim. He asserts a lien on the land. If he has none, he is out of the case. This was the question tried on his counter-claim. The

Holten v. The Board of Comm'rs of Lake County.

appellee denied the existence of his lien. This was the question tried. The court found his asserted lien did not exist. The evidence is in the record. We cannot say, upon it, that the finding below and judgment were not correct. On the other hand, the appellee, the plaintiff below, was, and for a long time had been, in possession under a valid title, but had to try this cause with reference to two contingencies; one, that the mortgage lien of the appellant was invalid, constituted, in fact, no lien on appellee's land; the other, that it was a valid lien. Should the latter contingency turn out to be the fact, then the appellee was interested in showing the amount of prior liens and claims to which the appellant would have to take his decree on his mortgage subject, and which he would be compelled to pay to redeem. The appellant had not been made a party to the foreclosure of the prior mortgage to Kellogg, and, hence, his existing right to redeem. And, if he could be considered a party to the State's foreclosure of her mortgage, that embraced but eighty of the five hundred and sixty acres of the farm.

We are now, to some extent at least, prepared to consider the objections of appellant to the proceedings below. There are two series of them; one relating to the proceedings on the trial upon the appellant's counter-claim; the other relating to those touching the claims of the appellee upon the land.

Of the first series, it is claimed there was a trial without an issue, and that this fact constitutes a fatal error. There was a denial filed to the paragraphs of answer by way of counter-claim. But if it were not so, and there actually had been a trial without an issue, that fact would not constitute error. *Moffit v. The Medsker Draining Association*, 48 Ind. 107.

On the trial upon the counter-claim, Field, a witness for the appellee, testified, without objection, to the contents of a deposition. The point was made in the motion for a new trial. But, as the testimony was not objected

Holten v. The Board of Comm'rs of Lake County.

to on the trial, the objection came too late, on the motion for a new trial. 2 R. S. 1876, p. 182, sec. 352, clause 8.

The court permitted one McWilliams, a witness, to give his estimate of the value of improvements made upon the farm. He appears to have been a person considerably experienced in the matters about which he testified, and was competent to give his opinion. *The Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171. But the rule is, that any witness who knows the facts personally may give an opinion, stating, also, the facts upon which he bases his opinion. *The City of Indianapolis v. Huffer*, 30 Ind. 235.

The court refused to permit testimony as to the reputation of a party for solvency or insolvency, as tending to show that he had or had not paid a debt, for which another party was surety. We think there was no error in this.

The court refused to permit appellant to testify that the attorney of the county promised that the county should pay his mortgage. As the general attorney of the county, he would have no power to make such a promise.

An original præcipe for an execution was offered in evidence, and objected to because it was the original, but the objection was overruled. There was no error in this.

Entries in a cash-book were not allowed to be proved by parol, before accounting for the absence of the book. This was right.

We turn now to proceedings on the trial on the complaint of appellee. The court permitted the record of the mortgage to the State, the sale upon it, the deed to the purchaser, and the purchaser's deed to the county to be given in evidence. The only ground of objection interposed was, that they conveyed no title.

The court permitted the record of the foreclosure suit on the Kellogg mortgage, the sheriff's sale and deed, and the deed from the purchaser to the board of commissioners to be given in evidence. They were objected to because illegal, improper and incompetent.

Holten v. The Board of Comm'rs of Lake County.

The objections to these items of evidence were too general to be available.

But we think they were admissible for the purpose for which they were offered, whether the proceedings were regular or not. That purpose was to show that appellee, the plaintiff below, had paid off the incumbrances prior to that claimed by appellant. The appellee was in possession, had a sufficient title to enable her to maintain this action to remove a cloud upon that title, as against the appellant. She was not suing the mortgagors, to oust them of possession, on the strength of title acquired by these sales. Had she been, she might have been compelled to prove them strictly regular.

But those mortgagors were not objecting to the sales; they had conveyed their equity of redemption to the appellee.

It was of no consequence to the appellant whether the appellant had paid those incumbrances or not, or whether the foreclosures on them were regular or not. Those facts in no manner affected his rights. If his lien failed of establishment, he had no interest in the land. If his lien was established, it was subject to all these prior liens, whether in the hands of the original holders, or of the appellee as equitable assignee. He, therefore, could not be harmed by the admission of the evidence.

It is urged, here, though the objection was not made on the trial, that the deeds to the appellee were void for want of power in her to take them—power to purchase land.

She had a right to purchase and hold a poor farm, and she is not shown to have obtained one prior to this. *Hanna v. The Board of Commissioners, etc.*, 29 Ind. 170. And if her purchase of this land was *ultra vires*, appellant could not attack it in this proceeding. If the appellee had not the title, the former owner had, but appellee would hold until office found. *Hayward v. Davidson*, 41 Ind. 212.

Pettit v. Braden.

The appellant moved to strike out certain paragraphs of appellee's complaint, and certain bills and parts of bills of particulars, showing the amount of her liens paid and claims on the farm, which was overruled.

For the reasons above given, as to the admission in evidence of those claims, we may say that the appellee was not injured by these rulings. They did not affect the validity of his alleged lien; and, as he failed to establish that, he had no interest in the premises. Having failed to establish that, he cannot complain of rulings, for that reason rendered harmless, whether right or wrong, as to him.

Other objections of a similar character are raised, but what we have said is applicable to and disposes of them.

The judgment below is affirmed, with costs.

PETTIT v. BRADEN.

STATUTE OF FRAUDS.—Sale of Personalty.—Instruction to Jury.—At a public sale, by the plaintiff, of his personal property, a portion thereof was bid off by a person who, being unable to give security for the purchase price, could not obtain possession thereof; whereupon the defendant verbally agreed that he would see that the plaintiff got his pay, if he would deliver such property to the bidder, to which the plaintiff acceded and made such delivery to the bidder.

Held, in a suit by the plaintiff, against the defendant, to recover such purchase price, that such agreement is void by the statute of frauds.

Held, also, that an instruction to the jury trying such cause, that such agreement made the defendant liable for such price, was erroneous.

Held, also, that the test, as to whether the defendant in such case is liable, is, whether any credit *whatever* was given to the person receiving the property, and if there was, then the defendant is not liable.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellant.

C. D. Jones, for appellee.

Pettit v. Braden.

Howe, J.—This was an action by the appellee, as plaintiff, against the appellant, as defendant, in the court below, to recover the value of certain personal property, described in a bill of particulars filed with the complaint, alleged to have been sold and delivered by the appellee, to the appellant.

To appellee's complaint, the appellant answered in three paragraphs, as follows:

1st. A general denial;

2d. Payment in full; and,

3d. For a further answer to that portion of appellee's complaint, which sought to recover judgment for the oats and corn, mentioned in the bill of particulars filed with said complaint, the appellant said, that, before this suit was commenced, the appellee and the appellant had a settlement of all claims of every kind whatsoever existing between them; that said claim for oats and corn, referred to in appellee's complaint and bill of particulars, entered into and formed a part of said settlement, and was paid and satisfied; and for answer to the balance of the claim sued on by appellee, the appellant denied each and every allegation thereof.

To the second and third paragraphs of appellant's answer, the appellee replied by a general denial.

And the action being at issue was tried by a jury, in the court below, and a verdict was returned for the appellee. And, on written causes filed, the appellant moved the court below for a new trial, which motion was overruled by the court, and to this decision the appellant excepted, and judgment was then rendered upon the verdict, in favor of the appellee and against the appellant, from which this appeal is here prosecuted.

In this court, the appellant has alleged, as error, the decision of the court below, overruling his motion for a new trial. In his motion, the appellant assigned the following causes for a new trial:

Pettit v. Braden.

1st. That the verdict was not sustained by sufficient evidence;

2d. That the verdict was contrary to law; and,

3d. Error of law, occurring at the trial and excepted to by appellant, in this: That the court below, over appellant's exception and objection, on its own motion, erroneously charged the jury as follows: "If you find from the evidence, that, at the time of the sale of the hay, mentioned in the plaintiff's bill, that the plaintiff and another man, other than the defendant, were talking about the purchase of said hay, and that the defendant stepped up and told the plaintiff to let the person they were conversing with have the hay, and that he, the defendant, would see it paid for, and thereupon the plaintiff did let said other person have it and parted with the possession, this, the court instructs you, was a sale to the defendant,"—as set out and excepted to in bill of exceptions No. 1, then on file in said cause.

If the instruction of the court below, to the jury trying the cause, was a correct statement of the law applicable to this cause, the judgment must be affirmed; otherwise, it must be reversed. For, although the evidence was directly conflicting, yet we could not disturb the verdict on that account, as it is the peculiar province of the jury to reconcile conflicting evidence, and to determine which of the witnesses is the more worthy of belief, for which purpose the jury have opportunities and facilities that we can not possibly have.

On the trial in the court below, the appellee testified, in his own behalf, that he had had a public sale on the 29th day of November, 1870, at which a man named Meeks had bid off some corn, hay and oats, but when he came to make a settlement therefor, he could not give security; that appellant then told the appellee, that he would take the corn and oats bid off by Meeks, as his own, and that, if Meeks should get the hay, he, the appellant, would see that the appellee should get his pay for it; and that he,

Pettit v. Braden.

the appellee, called on the appellant, the next morning, for the purpose of getting the matter in definite shape, and that appellant then said, "Braden, if Meeks gets that hay, I will see that you get your pay."

This evidence puts the case of the appellee in its most favorable light for him; and it is evident, we think, that the promise of the appellant, as stated in appellee's own evidence, was apparently within the second case in the 1st section of the statute of this State, for the prevention of frauds, etc., approved June 9th, 1852. 1 R. S. 1876, p. 503. Appellant's promise was, clearly, that he would answer for the debt or default of Meeks, and was not in writing, nor was there any memorandum or note thereof, signed by the appellant or by any person thereunto by him lawfully authorized. It is often very difficult to determine whether or not it was intended by the parties that the liability of a promisor, in such a case as this, should be primary or only collateral. The true rule seems to be, that, if any credit at all be given to the person getting the goods or property, then the promise of the third person must be held to be collateral, and, if not in writing, within the statute of frauds. In such a case as this, where the appellant's promise was wholly parol, the important and controlling question for the jury was this: To whom, do you find, from the preponderance of the evidence, was credit given by appellee for his hay? Did the appellee, from the evidence, give any credit at all to Meeks?

And here, in our opinion, was the error in the instruction of the court below, to the jury trying this cause. It should have been left to the jury to determine, from the weight of the evidence, whether or not the appellee let Meeks have his hay wholly upon appellant's credit. And the court below should have instructed the jury, that, unless they found that appellee let Meeks have the hay wholly upon appellant's credit, or if they found that appellee gave any credit at all to Meeks in the transaction,

Doherty et al. v. Bell.

then there was no sale of the hay, by appellee, to appellant; and in that case, if they found from the evidence, that appellant's promise to the appellee was not in writing, then the promise was within the statute of frauds, and they must find for the appellant. *Ellison v. Wisheart*, 29 Ind. 32; *Crosby v. Jeroloman*, 37 Ind. 264.

For the third cause, assigned by appellant for a new trial of this action, in our opinion, his motion for such new trial ought to have been sustained; and, for the error committed by the court below, in overruling that motion, the judgment of that court must be reversed.

Judgment reversed, at appellee's costs, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings.

DOHERTY ET AL. v. BELL.

55	205
128	185
55	205
160	677

PROMISSORY NOTE.—*Fraud.—Waiver.—Ratification.—Parol Contract.*—In a suit upon a promissory note, against the maker, by an endorsee, where the answer of the defendant alleges facts showing that the execution of such note was procured by fraud, and without consideration, a reply thereto is sufficient which alleges, that, after the assignment and the maturity of such note, the defendant verbally agreed with such endorsee, that, in consideration that the latter would extend the time of payment thereof for a specified period, he would then pay the same, and that such extension had been given; such agreement being a waiver of such fraud and a ratification of the execution of such note.

SAME.—*Variance.*—*Held*, also, that such reply is not a variance.

SUPREME COURT.—*Practice.—Pleading.—Demurrer.*—Where the evidence is not in the record on appeal to the Supreme Court, the sustaining of a demurrer to a sufficient paragraph of a pleading is available as error.

From the Parke Circuit Court.

P. S. Kennedy and *W. T. Brush*, for appellants.

S. F. Maxwell and *S. D. Puett*, for appellee.

NIBLACK, J.—The appellants, as the assignees of one

Doherty et al. v. Bell.

James B. Drake, sued the appellee in the court below, on a promissory note, bearing date the 20th day of June, 1872, and payable six months after date, at The First National Bank of Indianapolis, which was alleged to have been assigned before maturity.

The appellee answered in two paragraphs.

In the first paragraph the appellee charges, in substance, that, on the day on which said note bears date, one Harris, who represented himself as a general agent for the sale of "Drake's Horse Hay-Fork and Hay-Carrier," in this State, came to his, appellee's, house and induced him to agree to become the agent in his township for the sale of machines bearing that name. That said Harris represented that a given number of machines would be furnished within a reasonable time, one of which should be immediately, as a specimen of and advertisement for the rest. That, to save trouble, he, the appellee, was required to execute a note to James B. Drake, the proprietor of the machines, for the value of the machines to be furnished, to be payable out of the proceeds of said machines, when sold. That the said Harris thereupon prepared some kind of an agreement in writing, purporting to be, in some respects, in the similitude of a promissory note, for him, the appellee, to sign. That, at the time, his, appellee's, eyes were so sore and diseased that he was unable to read writing, and that he relied on said Harris to read said writing to him. That said Harris then twice pretended to read to him what he, said Harris, claimed were the contents of said agreement in writing. That, as said agreement was thus read to him by said Harris, he, the appellee, was to be only required to pay the sum of money agreed upon, to wit, three hundred and seventy-five dollars, out of the proceeds of the sales of said horse hay-fork and hay-carrier machines, and not otherwise in any event, and was not to be otherwise bound, in some material respects, as it is claimed he is, by the note sued on. That the said appellee, relying on the

Doherty et al. v. Bell.

representations aforesaid of the said Harris, as to the contents of said agreement, signed the same, and permitted the same to be taken away by said Harris. Wherefore the appellee says the note sued on is not his note.

This paragraph was verified by the affidavit of the appellee.

The second paragraph, in its material averments, is very similar to the first, concluding with the allegation that neither the said Drake, nor any one else, on his behalf, has ever furnished the appellee with any of said machines.

The appellants replied to both paragraphs of the answer, as follows:

1st. In general denial.

2d. "And for a second and further reply to defendant's answer, plaintiffs say, that, after said note sued on was assigned by the endorsement of said Drake, to them, the said defendant promised and agreed with plaintiffs to pay the same, if they would wait on him one year from the 6th day of December, 1872, which they did. Wherefore they demand judgment."

The appellee demurred to the second paragraph of the reply, and the court sustained the demurrer, to which the appellants excepted.

The cause being at issue was tried by a jury, and there was a verdict and judgment for the appellee.

The appellants assign for error the ruling of the court in sustaining the demurrer to the second paragraph of the reply, and in that way the sufficiency of that paragraph becomes the only question arising upon the record, in this court. No question is made upon the sufficiency of any of the other pleadings.

The facts presented by this paragraph of the reply, to which our attention is directed, might, perhaps, have been more fully, more specifically and more circumstantially pleaded, and thus had greater emphasis given to their assertions, but we are inclined to the opinion, that, as

Doherty *et al.* v. Bell.

alleged, they constitute a good reply to the appellee's answer.

If the appellee, with full knowledge of all the facts, as we think it fair to presume, from the allegations in the reply, it was intended to charge he had, and after the appellants became the owners of it, agreed to pay the note, provided a certain extension of time was allowed him, and in consideration thereof, such an extension was given him, we must regard him as having ratified the execution of the note, and as having waived whatever objection or defence he may have had to the manner of its execution. We do not hold that any new contract was created thereby, but that the old one was in that way recognized and ratified *Jaqua v. Montgomery*, 33 Ind. 36; *Hefner v. Vandolah*, 62 Ill. 483; *Hefner v. Dawson*, 63 Ill. 403. In the case of *Ray v. McMurtry*, 20 Ind. 307, cited by the appellee, the questions of estoppel and the validity of an alleged new contract, only, were discussed and decided.

A promise to pay a debt barred by the statute of limitations does not create a new debt, but only revives and restores the old one, and the reply of a new promise to pay an old debt, when the statute of limitations is set up as a defence, is not a departure from the complaint.

Again, the allegation in the reply, that the appellee promised to pay the note, after its execution, on a reasonable and easy condition, is inconsistent with the averments in the answer, that the note was procured by fraud. It was held, in *Meredith v. Lackey*, 14 Ind. 529, that if the reply set up, even argumentatively, facts inconsistent with the allegations in the answer, it is sufficient.

We feel constrained to hold, that the court erred in sustaining the demurrer to the second paragraph of the reply.

The evidence is not in the record, and we can not therefore determine whether the appellants were injured on the trial, by that ruling of the court, but must presume they were.

Graham v Kennedy.

The judgment is reversed, at the appellee's costs, and the cause is remanded for further proceedings, in accordance with this opinion.

GRAHAM v. KENNEDY.

SUPREME COURT.—Practice.—Demurrer.—Where no exception is reserved to the action of the circuit court in sustaining a demurrer to a pleading, no question in relation to such ruling can be presented to the Supreme Court, on appeal.

From the Daviess Circuit Court.

J. W. Burton and J. W. Ogdon, for appellant.

NIBLACK, J.—This was a proceeding in the court below, by the appellant, against the appellee, who was then treasurer of Daviess county, to enjoin the collection of certain taxes, alleged to have been wrongfully assessed. It was, in substance, charged in the complaint, that in November, 1873, the appellant deposited fifteen thousand dollars in Government bonds, with Messrs. Spink & Veale; and took from them a mortgage to secure the return of said bonds, in November, 1874, without parting with his property in said bonds. That in May, 1874, said mortgage was listed and assessed against him, the appellant, for taxes. That taxes had been charged on such assessment, on the tax duplicate of said county, for the year 1874, against him, which the appellee, as such treasurer, was threatening to collect.

A demurrer to the complaint was sustained, and there was judgment on demurrer, against the appellant.

The sustaining of the demurrer to the complaint is assigned for error, in this court. No exception seems to have been reserved, however, to the action of the court

Hilgenberg v. Wilson, Treasurer.

in sustaining the demurrer; and, in consequence, as has been repeatedly decided by this court in similar cases, no question is presented for our decision here. *Compant v. Hedges*, 6 Blackf. 416; *Jones v. Van Patten*, 3 Ind. 107; *Heaston v. Colgrove*, 3 Ind. 265; *McKinney v. Springer*, 6 Ind. 453; *Zehnor v. Beard*, 8 Ind. 96; *Atkinson v. Gwin*, 8 Ind. 876; *Vance v. Cowing*, 13 Ind. 460; *Dickerson v. Turner*, 15 Ind. 4; *Wheeler v. Carpenter*, 9 Ind. 158; *French v. Blanchard*, 9 Ind. 260; *Mullinix v. The State*, 10 Ind. 5; *Tyler v. Wilkinson*, 10 Ind. 53; *Brightwell v. McLane*, 11 Ind. 210; *Pace v. Oppenheim*, 12 Ind. 533; *Preston v. Sandford's Adm'r*, 21 Ind. 156; *Ferris v. Johnson*, 27 Ind. 247; *Ringle v. Bicknell*, 32 Ind. 369; *Train v. Gridley*, 36 Ind. 241; *Hauser v. Roth*, 37 Ind. 89.

The judgment is affirmed, with costs.

HILGENBERG v. WILSON, TREASURER.

ASSESSMENT OF TAXES.—Removal of Taxpayer.—Cities and Towns.—The fact that a person, who was the owner of personal property, had been assessed thereon, on the first day of April, for taxation for State and county purposes, will not prevent his being assessed upon the same property, for city purposes, upon his removing into a city of the county where he had been so assessed, prior to the first day of June, following, carrying such property with him.

PLEADING.—Presumption.—Cities and Towns.—In an action wherein a city of this State is a party, it will be presumed, unless the contrary is alleged, that she is organized under the general law of this State for the incorporation of cities.

From the Wayne Circuit Court.

J. S. Tarkington, for appellant.

L. D. Stubbs, for appellee.

Howk, J.—In this action, the appellant was plaintiff, and the appellee was defendant, in the court below.

Hilgenberg v. Wilson, Treasurer.

In his complaint, the appellant alleged, in substance, that on the 2d day of April, 1873, and for two years then last past, he, the appellant, resided in Wayne township, Wayne county, Indiana, but without the corporate limits of the said city of Richmond, and had all his personal property with him where he resided; that on the said 2d day of April, 1873, he was called on by the county assessor for a list of his taxable personal property, and he then and there made a full and true statement, in writing, to said assessor, of all the personal property, of which he was the owner or holder, in any capacity, and also of all moneys or credits so owned or held by him, on the 1st day of April, 1873, which said statement, having been subscribed and sworn to by him, was accepted by said assessor; that afterwards, to wit, on or about the 10th day of April, 1873, the appellant moved into said city of Richmond, taking with him the property so assessed by the county assessor, and thereupon the city assessor of said city of Richmond required of the appellant a schedule of all his personal property, subject to taxation for the municipal and special purposes of said city, had and held by him on the 1st day of January, 1873; that appellant informed said city assessor, that he had been assessed by the county assessor on all his property subject to taxation, and he refused to furnish said city assessor with the required schedule; but the city assessor insisted upon his right to make an assessment of appellant's personal property, for city purposes, and threatened to assess him, upon estimation, at least double the amount of his personal property; that, to avoid such estimated assessment, the appellant, on the 18th day of August, 1873, made and delivered to said city assessor his sworn schedule, under protest, containing the same personal property that was in the schedule made out and given to the county assessor; that the said city assessor accepted said schedule, and filed it with the city clerk, who estimated the appellant's city taxes thereon at two hundred and sixty-one dollars and eighty

Hilgenberg v. Wilson, Treasurer.

cents, and placed the same on the tax duplicate of said city, and in the hands of the appellee, as city treasurer; and that said tax duplicate, under the seal of said city and the warrant of said clerk, was then in the hands of the appellee, who threatened to levy upon and sell the appellant's property, at public auction, for said sum of two hundred and sixty-one dollars and eighty cents, and penalty, interest, costs, and accruing costs; and that appellant had long before paid the tax assessed against him by the county assessor. Copies of the two schedules were filed with said complaint.

Appellant prayed that the appellee might be enjoined from collecting said city taxes or any part thereof, and for all other proper relief.

The appellee demurred to appellant's complaint, for the following grounds of objection:

1st. That there was a defect of parties defendant; and,

2d. That said complaint did not state facts sufficient to constitute a cause of action.

This demurrer was sustained by the court below, and appellant excepted. And judgment was rendered for the appellee and against the appellant, upon the demurrer, for costs, from which this appeal is now prosecuted.

In this court, the only alleged error is the decision of the court below, sustaining appellee's demurrer to appellant's complaint.

The question presented by this alleged error, for our consideration and decision, is this:

Under the facts alleged in appellant's complaint, was his intangible personal estate lawfully subject to taxation, in and by the city of Richmond, for city purposes, for the year 1873?

In our opinion, this question has been much more elaborately argued by counsel on both sides, than either its difficulty or its importance demanded. The city of Richmond is described in the complaint as an incorpo-

Hilgenberg v. Wilson, Treasurer.

rated city, but whether it was incorporated under a special charter, or under the general law for the incorporation of cities, the appellant has failed to allege. In such a case, however, this court will presume, nothing appearing to the contrary, that the city was incorporated under the general law for the incorporation of cities. *The City of Logansport v. Wright*, 25 Ind. 512.

By the 58th section of this general law, "all property subject to State and county taxation," within any city incorporated under said law, is made liable to taxation for municipal purposes. 1 R. S. 1876, p. 297. The appellant concedes that his personal property was subject to State and county taxation for the year 1873, for he alleges, that, on the 2d day of April, 1873, in Wayne township, Wayne county, Indiana, where he then resided, and outside the corporate limits of the city of Richmond, he made and delivered to the county assessor a schedule of his said personal property, for State and county taxation. Eight days afterwards, he removed from his country home, and, entering within the corporate limits of the city of Richmond, he became a citizen thereof, taking with him his said personal property,—which was none the less liable or subject to State and county taxation, by reason of his change of residence.

When he thus became a citizen of said city of Richmond, he was required by the city assessor to list his said personal property, which, as we have seen, was subject to State and county taxation, and was then within the corporate limits of said city, for taxation for municipal purposes. The appellant furnished the required list to the city assessor, under protest. And the question arising on these facts is this:

Was the property in question properly and legally liable to taxation, for the year 1873, by the city of Richmond, for city purposes?

By the 24th section of the general law for the incorporation of cities, which prescribes the duties of city as-

Hilgenberg v. Wilson, Treasurer.

sessors, it is provided, among other things, that "such assessor and assistants shall have the same powers and be subject to the same provisions of the same laws as the assessor of personal property for State and county purposes." 1 R. S. 1876, p. 276.

By the 14th section of "An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon," approved December 21st, 1872, it was provided as follows:

"Sec. 14. Personal property shall be listed between the first day of April and the first day of June, each year, when required by the assessor, and with reference to the quantity held or owned on the first day of April in the year for which the property is required to be listed. Personal property purchased or acquired on the first day of April shall be listed by or for the person purchasing or acquiring it." 1 R. S. 1876, p. 76.

And again, by the 33d section of the same act, it was provided as follows:

"Sec. 33. The owner of personal property removing from one county, township, city or town to another, between the first day of April and the first day of June, shall be assessed in either in which he is first called upon by the assessor. The owner of personal property moving into this State, from another State, between the first day of April and the first day of June, shall be listed for his poll and the property owned by him on the first day of April of such year in the county, township, city or town in which he resides: *Provided*, if such person has been assessed and can make it appear to the assessor that he is held for tax of the current year on the property, in another State, county, township, city or town, he shall not be again assessed for said year." 1 R. S. 1876, p. 79.

By a fair and reasonable construction of these several provisions, it follows, in our opinion, that where the owner of personal property on the 1st day of April, 1873, living in a county of this State on that day, in which

Hilgenberg v. Wilson, Treasurer.

there was an incorporated city, afterwards and before the 1st day of June, 1873, removed from his country home and located his domicile within the corporate limits of such city, taking with him his said personal property,—he became liable to be assessed by the city assessor, for his said personal property, for the purposes of city taxation; and the fact, that, prior to his removal into the city, he had listed his said property for taxation for State and county purposes, would not, in such a case, render his said personal property any the less liable to assessment and taxation for city purposes. Nor will this construction of the provisions in question work any injustice or peculiar hardship to the appellant in this case. City government is an expensive luxury. He who would enjoy the many comforts incident to a home in the city, must contribute his just proportion of the expenses of the city government. Appellant's counsel concedes, as we understand him, that if the appellant had moved into the city of Richmond on the 1st day of April, 1873, taking his personal property with him, then his said personal property would have been legally liable to assessment and taxation by the city authorities for city purposes. The mere fact that the appellant moved into the city, ten days after the 1st day of April, 1873, taking with him the personal property owned by him on the last named day, did not, and ought not to, in our opinion, under the law we have quoted, render his said personal property free from taxation for city purposes until the 1st day of April, 1874.

In our opinion, the court below did not err in sustaining appellee's demurrer to appellant's complaint, in this action.

The judgment of the court below is affirmed, at the costs of the appellant.

Dawson v. Wilson et al.

DAWSON v. WILSON ET AL.

PROMISSORY NOTE.—*Set-off.*—*Payment.*—*Partnership.*—*Evidence.*—Where, prior to the maturity of a promissory note, executed by the defendant to the plaintiffs, in their copartnership name as a banking firm, one of the plaintiffs withdraws from such copartnership, which is continued by the other partners, in the old firm name, evidence that money was deposited with such firm by, or on behalf of, the defendant, after the maturity of such note, will not support a plea of set-off against, or payment of, such note.

SAME.—*Abatement.*—*Discontinuance.*—Where, in a suit against two joint makers of a promissory note service of process is had upon one, but not upon the other, “abatement of the action” as to the latter does not discontinue such suit.

From the Warren Circuit Court.

W. P. Rhodes and *W. C. Wilson*, for appellant.

H. W. Chase, J. A. Wilstach and *F. S. Chase*, for appellees.

BIDDLE, J.—Complaint on a promissory note, made by Henry C. Dawson, principal, and Charles J. Dawson, the appellant, his surety, payable to the appellees in the name of their firm, Wilson & Hanna. Henry C. Dawson was not served with process, and as to him the suit was abated. Charles J. Dawson answered in four paragraphs, upon which issues were joined by a general denial. Trial by jury, verdict for appellees, and, over a motion for a new trial, overruled, and exceptions, the court rendered judgment on the verdict.

The appellant, in his brief, informs us that “the principal defences relied on at the trial were,

1st. “That, on the 24th day of July, 1873, Henry C. Dawson and wife conveyed to Alexander Wilson, for the firm, a large tract of land in Warren county, for the consideration of seventeen thousand five hundred dollars, in payment of certain other indebtednesses he owed the appellees, amounting to about fifteen thousand dollars, and that the overplus, two thousand five hundred dollars, was to be applied to the note sued on; and,

Dawson v. Wilson et al.

"2d. That, after the maturity of the note, the principal therein, Henry C. Dawson, deposited with the appellees, who were bankers in the city of Lafayette, large sums of money, more than sufficient to pay this debt."

These defences were submitted to a jury upon the questions of fact, and found against the appellant. But he complains that "The appellees were permitted to prove, that, on the 1st day of October, 1873, the partnership existing between the appellees was dissolved by the retirement of Joseph S. Hanna, and that, after that, the firm consisted of Wilson and Hugh H. Hanna." This was proper, under the issues, to show that there was no surplus, arising out of the lands conveyed to Wilson, to be applied to the note, as against the firm as it stood at the time. The new firm was not liable on the obligations of the old firm, unless made so by express stipulation.

The appellant also complains because the court instructed the jury "That the withdrawal of one of the partners from the firm, if it took place before the maturity of the note, would prevent the new firm from applying deposits made with them to the payment of the note sued on." This is right. The deposits belonged to the new firm, unless they were made expressly to apply on the note in suit, and of this there is no evidence in the record; indeed, the evidence runs quite to the contrary.

The last point urged in the appellant's brief, under a motion in arrest of judgment, is, "that the abatement of the action as to Henry C. Dawson was, in law, a discontinuance of the suit." The statute and the decisions of this court are against him. 2 R. S. 1876, p. 51, sec 42; *Cutchen v. Coleman*, 13 Ind. 568; *Erwin v. Scotten*, 40 Ind. 389.

We have thus examined all the questions discussed by the appellant in his brief, and all the points he urges against the record. We do not find any of them in his favor.

The judgment is affirmed, with costs.

Moon et al. v. Martin et ux.

MOON ET AL. v. MARTIN ET UX.

GUARDIAN AND WARD.—*Conversion of Ward's Estate.—Purchaser with Notice.*

—*Insolvency.*—Where a guardian has become insolvent, and the penalty of his bond has been exhausted, in a suit thereon, by a judgment against him and his surety, leaving an unsecured deficiency in the amount yet due to the ward, nevertheless the latter, in an action therefor, is entitled to a decree against such guardian such surety, and the assignee and judgment defendant, vesting in the ward the title to a judgment for an amount not exceeding such deficiency, against such defendant, wrongfully procured by such guardian, in his own name, upon a chose in action belonging to his ward's estate, and unlawfully assigned to such assignee, who received the same with knowledge of such conversion.

SAME.—*Defence.—Tender.*—In such an action it is no defence, that, prior to its commencement, and prior to his procuring such judgment, the guardian had offered to transfer such chose in action to the ward, upon condition that the latter would receipt the former for the amount thereof as so much cash upon the amount due to the ward, if such tender is not made good by bringing it into court.

From the Hendricks Circuit Court.

C. C. Nave and C. A. Nave, for appellants.

L. M. Campbell, for appellees.

PERKINS, J.—Cyrus Hunt was guardian of Rebecca J. Martin, and Milo H. Moon was surety upon his bond as such guardian. John V. Martin is now the husband of said Rebecca. Her name, as the ward of Hunt, was Rebecca J. Hussey. Said Rebecca and her said husband instituted a suit, in the name of the State, against said Hunt and Moon, on the bond of the former, above mentioned, and, on the 11th day of December, 1874, recovered a judgment against said Hunt and Moon for the amount of the penalty of the bond, being two thousand dollars, which judgment was affirmed by this court, on appeal. *Hunt v. The State, ex rel., etc.*, 53 Ind. 321.

In that suit, the jury found that Hunt had in his hands, unaccounted for, the sum of two thousand seven hundred and forty-two dollars, being seven hundred and forty-two dollars more than the penalty of the bond.

The court limited the judgment to two thousand dol-

Moon et al. v. Martin et ux.

lars, being the penalty of the bond, without prejudice to the plaintiff's right to further proceedings against Hunt, for the remaining seven hundred and forty-two dollars.

One of the items of the ward's property, which the guardian had in his hands, was a note, secured by mortgage, on one Bland, upon which note and mortgage said Hunt had obtained judgment in his own name, which judgment he had assigned to Christian C. Nave and Milo H. Moon, they having full knowledge, at the time, that it was the property of the plaintiff, Rebecca J. Martin, and which judgment they are seeking to collect for their own benefit.

The present suit was brought against said Bland, Moon, Nave and Hunt, to obtain a decree of the court, declaring that that judgment on the Bland claim is the property of said Rebecca, and giving her the right to collect it, and restraining the others, etc. Hunt was insolvent. The complaint was good on demurrer, and there was no motion to make its allegations more certain and definite. Demurrers were sustained to the defendant's affirmative paragraphs of answer. The paragraphs were clearly bad. One of them, as we understand it, interpreted by what appears in the record, set up as a defence, the fact that Hunt had offered to deliver to the plaintiffs the note and mortgage, if they would credit the amount of them as so much money paid on Hunt's cash defalcation.

The declension of the alleged conditional offer could not have the effect to vest the ownership of the property in Hunt as his individual property, nor authorize him to convert it to his own use. The offer was not followed up by bringing the note and mortgage into court.

Nor do we think the suit and judgment therein, on the bond above mentioned, against Hunt and Moon, a bar to this proceeding. This is a suit to restrain the misappropriation of a specific article of property of the late ward, and to procure a judgment and decree declaring the own-

Crawford *et al.* v. Crockett *et al.*

ership of it to be in said ward, with right to receive it, etc.,—property not covered by the judgment on the bond, and for which that judgment affords no security. This cause was commenced in December, 1874, and was tried by the court, and a judgment and decree, according to the prayer of the complaint, were rendered; over a motion for a new trial for the plaintiffs.

The evidence is in the record, and no question is presented, except the single one as to whether it sustains the judgment. No exception was taken to any evidence by either party, and all was admitted that was offered. No special finding was requested or made.

The court found, generally, for the plaintiff, and rendered judgment accordingly.

The record of the judgment, with the special finding of the jury as to the amount of the funds of the ward in the hands of the guardian, in the case of *Hunt v. The State, ex rel., supra*, was given in evidence, without objection. The cases of *Wallace v. Brown*, 41 Ind. 436, and *Summers v. Hutson*, 48 Ind. 228, and cases in them cited, are full to the questions of law upon which the judgment and decree in this suit securely rest.

The judgment is affirmed, with costs.

CRAWFORD ET AL. v. CROCKETT ET AL.

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MECHANICS' LIENS.—*Material Man.*—*Lien.*—*Personal Liability.*—*Statute Construed.*—*Remedy.*—Section 647 (2 R. S. 1876, page 266) gives to a material man a right to acquire a lien upon a building for which he has furnished material, and section 650 prescribes the means by which it is to be acquired; while section 649 gives to him a right, by taking the steps therein required, to hold the owner of such building personally liable for the value of such material: being separate and independent remedies, either or both of which may be acquired.

SAME.—*Pleading.*—*Action to Enforce Personal Liability.*—*Notice.*—To hold

Crawford *et al.* v. Crockett *et al.*

such owner personally liable for the price of such material, he must have been served with the notice required by such section 650, of an intention to hold him so liable; and, for this purpose, a notice of an intention to acquire a lien upon his property is insufficient.

SAME.—Pleading.—Complaint to Enforce Lien.—Arrest of Judgment.—Where, in an action to enforce a lien against the defendant owner's real estate, for the price of material sold to, and used by, a contractor in the erection thereon of a building, the complaint alleges simply, that such material was furnished by the plaintiff to such contractor, and used by him in the construction of such building, it is bad on motion in arrest of judgment.

SAME.—To hold the property of a person liable to a lien for the value of material used by his contractor in erecting a building thereon, the material man must have furnished it expressly for use in such building.

SAME.—Practice.—Striking Cause from Docket.—Parties.—Where, in such action, a motion in arrest of judgment is properly sustained on account of the insufficiency of the complaint, the fact that such contractor is a party defendant therein is no reason that the cause should not be struck from the docket on motion.

SAME.—Amendment.—An amendment to a complaint to enforce a material man's lien, changing the nature of the action to one to enforce a personal liability against the defendant owner, but leaving the complaint fatally defective for want of an allegation that the proper notice had been given by the plaintiff, to the defendant, of the intention of the former to hold the latter thus liable, can not be made.

SAME.—Arrest of Judgment.—The filing of an amended complaint in a cause, after a motion in arrest of judgment has been sustained, does not bring the defendant back into court, as such arrest puts an end to the cause.

SUPREME COURT.—Practice.—Presumption—Where, from the record on appeal to the Supreme Court, it does not appear that the party complaining of a ruling has been injured thereby, such ruling will be presumed to have been right.

From the Cass Circuit Court.

F. Swigart, for appellants.

F. S. Crockett, for appellees.

WORDEN, C. J.—Action by the appellants, against the appellees, Crockett and Woodling. The complaint was as follows:

“For amended complaint herein, the plaintiffs say that they are a firm, doing a general lumber business in the city of Logansport, Indiana, under the firm name and

Crawford et al. v. Crockett et al.

style of Crawford & Co.; that on or about the 16th day of April, 1869, they sold and delivered to one Jefferson Woodling a large lot of lumber, the particulars of which are set forth in 'Exhibit A,' filed herewith and made a part of this complaint; that [there] remains due and unpaid, for said lumber, the sum of two hundred and fourteen dollars and fifty-nine cents, from defendants to plaintiffs.

"The plaintiffs further aver that the defendant Crockett was, on the 15th day of April, 1869, and is, the owner in fee of the east quarter of lot number twenty (20) in The Administrator's of John Tipton, deceased, First Addition to the Town of Logansport; that the said Woodling used the said lumber in and upon the construction of a house for said Crockett, upon said lot number twenty (20), under a contract entered into with said Crockett for that purpose; that on the 12th day of July, 1869, the plaintiff filed, in the recorder's office of Cass county, a notice to the said defendant Crockett, of his intention to hold a mechanic's lien on said house, erected by said Woodling on lot number twenty, (20) and the real estate on which said house is situate, a copy of which is filed herewith, marked 'Exhibit B,' and made a part of this complaint; that said notice of his lien was recorded on page 307 of Miscellaneous Record No. 2, in the recorder's office of Cass county, Indiana, on the 12th day of July, 1869, within the time allowed by law for filing mechanics' liens, and before the building was completed; that [on] said 12th day of July, 1869, the plaintiffs delivered to the defendant Crockett a written notice that the plaintiffs intended to hold a lien on said house, and that for the said sum of two hundred and fourteen dollars and fifty-nine cents; that said writing is in the hands of the defendant, and the plaintiffs can not give a copy. Wherefore the plaintiffs demand judgment against the defendants, in the full sum of two hundred and fifteen dollars, and interest from the 12th day of July, 1869, and the enforcement of

Crawford et al. v. Crockett et al.

the mechanic's lien, as against the property of the defendant Crockett, and the costs of this suit, and other relief."

Issues were formed, and the cause was tried by the court, resulting in a finding for the plaintiffs, in the following words:

"And the court, after hearing the evidence, finds for the plaintiffs, that there is due to the plaintiffs, from the defendant Frank S. Crockett, on this cause of action, the sum of two hundred and thirty-one dollars and ninety-six cents, and that the same is a lien on the real estate described in the lien herein."

This finding, on the motion of Crockett, and on written causes filed, was set aside and a new trial granted. Afterwards the cause was again submitted to the court for trial, and there was a finding for the plaintiffs, in the sum of two hundred and fourteen dollars and fifty-nine cents. Crockett again moved for a new trial, but his motion was overruled. He then moved in arrest of judgment.

Pending the motion in arrest, the plaintiffs asked leave to amend the complaint, so as to make it correspond with the proof, by adding the words, "And plaintiffs aver that defendant Crockett was, on the 12th day of July, 1869, indebted to his codefendant Woodling, in the sum of three hundred dollars."

The motion for leave to amend was overruled, and the motion in arrest of judgment sustained. Afterwards the plaintiffs filed what is called in the record an amended complaint in the cause, which is not in the record, the clerk stating that it is not on file; and, after this, on motion of Crockett, the court struck the case from the docket.

Errors are assigned upon the various rulings above stated.

It is claimed that the court erred in setting aside the first finding and granting a new trial. This ruling does not appear to have been wrong, and it will be presumed to have been right. The motion in arrest of judgment, and

Crawford *et al.* v. Crockett *et al.*

that for leave to amend the complaint, may be both examined together, as they involve, in some measure, the same considerations.

Section 647 (2 R. S. 1876, p. 266) gives one furnishing materials for the construction of a building the right to acquire a lien thereon, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of the materials furnished. Section 650 provides the mode of acquiring the lien, concerning which something more will be said hereafter. Section 649 provides for a personal liability in favor of sub-contractors, material men, etc., against the owner of the building, for the amount of their claims against their employer, but not to exceed the amount that is due, or may become due, from the owner to the employer; but they must, in order to hold the owner personally liable, give him notice in writing, particularly setting forth the amount of their claims, and that they hold him responsible therefor. Thus it is seen that material men, etc., may acquire a lien upon the property to the extent of the value of the materials furnished, or they may hold the owner of the building personally liable, not exceeding the amount that may be due, or may become due, from him to the contractor. They may do one or the other, or both. *Colter v. Frese*, 45 Ind. 96.

To acquire a lien on the property, it is provided by section 650, that the party must file in the recorder's office of the county, within sixty days after the completion of the building or repairs, notice of his intention to hold a lien upon such property, for the amount of his claim.

To acquire a lien on the property, the notice must be filed in the recorder's office; to hold the owner personally liable, notice in writing must be given him that the party holds him responsible.

Having looked at these provisions of the statute, we turn to the complaint, and the question that first suggests itself is, whether it was intended as a complaint to enforce

a lien upon the property, or to hold Crockett, or Crockett and Woodling, personally responsible. A joint action would not lie against Woodling and Crockett for the lumber, on the facts stated. We think, clearly, it was intended as a complaint to enforce a lien, and nothing else. It does not show that any step had been taken to fix a personal liability upon Crockett. It does not show that any notice had been given to Crockett that the plaintiffs held him responsible. It avers, to be sure, that the plaintiffs delivered to him a notice that they intended to hold a lien on the house for the sum claimed. But this is not what the statute requires in order to hold the owner responsible. If, therefore, the amendment which the plaintiffs asked leave to make had been made, still the complaint would have been radically defective as a complaint against Crockett, as for a personal liability. If the amendment could have been made at all, after the finding, as to which see *Heddens v. Younglove*, 46 Ind. 212, it was such a one as ought not to have been allowed, as it was intended to allow a personal recovery against Crockett, and would have changed the entire character of the action, from one to enforce a lien on property, to one to enforce a personal liability, and would still have left the complaint radically defective for that purpose, without making another amendment, leave to make which was not asked.

The complaint, viewed as one to enforce the lien, is radically defective in not averring that the lumber was furnished for the building, if for no other reason. It is not sufficient to aver that the lumber was furnished to the contractor and used in the building. *The City of Crawfordsville v. Barr*, 45 Ind. 258; *Hill v. Braden*, 54 Ind. 72, at the present term.

The court committed no error in refusing leave to amend, or in arresting the judgment.

The arrest of the judgment put an end to the case.

 Bowen v. Phillips, Adm'r, et al.

Raber v. Jones, 40 Ind. 436. The subsequent filing of an amended complaint did not bring the parties back into court, and the court did right in striking the case from the docket.

It is insisted, however, that it was error to arrest the judgment and strike the case from the docket, as to Woodling.

The gist of the complaint, as we have seen, was against Crockett, to foreclose the supposed lien, and Woodling was not a necessary, though perhaps a proper party. He may, perhaps, have been a proper party, in order to settle the question as to whether he owed the plaintiffs for the lumber, and, if so, how much, in order to establish the amount for which the plaintiffs were entitled to hold a lien; but whatever disposed of the case as to Crockett, disposed of it as to Woodling.

There is no error in the record, and the orders of the court below in arresting the judgment and striking the case from the docket, are affirmed.

Petition for a rehearing overruled.

BOWEN v. PHILLIPS, ADM'R, ET AL.

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INTEREST.—Usury.—Recoupment.—Tender.—Costs.—Action to Cancel Note and Satisfy Mortgage.—Statutes Construed.—During the operation of the act of May 27th, 1852, fixing the lawful rate of interest at six per cent. and allowing usurious interest to be recouped, and of the 51st section of the act of June 14th, 1852, declaring the bargaining for a greater rate of interest than that allowed by law to be a misdemeanor, a person executed a promissory note which included, as part of its principal, a usurious amount for interest, and also a mortgage upon real estate to secure it; during the operation of the act of December 19th, 1865, providing that where usurious interest had been voluntarily paid it could not be recouped, the maker voluntarily paid such usurious interest to the payee; and, during the present law of this State upon such subject, approved March 9th, 1867, providing for the recoupment of usurious interest, such

Bowen v. Phillips, Adm'r, et al.

maker instituted suit to cancel such note and mortgage, and seeking to recoup such usurious interest, so paid by him.

Held, that the latter act governs as to the remedy in such action, and that such usurious sum can be recouped.

Held, also, that upon a tender by the maker, to the payee, of the amount of the *real* principal of such note, with ten per cent. interest thereon, demanding the surrender of such note, and the release of such mortgage, prior to the bringing of such action, and the bringing of such tender into court, the maker is entitled to a decree satisfying such obligations, and to a judgment for costs.

From the Howard Common Pleas Court.

J. H. Gould, for appellant.

C. E. Hendry, for appellee.

Howe, J.—At the February term, 1872, of the court below, Philip Lung, as plaintiff, commenced this action against the appellant, as defendant. Such proceedings were afterward had in said cause as that, at the July term, 1872, of the court below, the plaintiff, Philip Lung, by the consideration of said court, recovered a judgment for the relief demanded in his complaint, against the appellant. In June, 1875, the appellant filed in this court a transcript of the record of this cause in the court below, and, also, an affidavit showing the death of the judgment plaintiff, in 1874, intestate, and that the appellees were his administrator and heirs-at-law.

The plaintiff's complaint was in two paragraphs.

In the first paragraph he alleged, in substance, that, on or about the 21st day of March, 1859, the plaintiff, by his promissory note, a copy of which was filed with and made part of the complaint, promised to pay the appellant two hundred and eighty dollars, two years after the date thereof; and, to secure the payment of said note, the plaintiff and his wife, Sarah Lung, executed and delivered to appellant a mortgage conveying to him the real estate in Howard county, Indiana, particularly described in said complaint, and a copy of said mortgage was filed with and made a part of said complaint; that the appellant was then the holder of said note and mortgage; that,

Bowen v. Phillips, Adm'r, et al.

prior to the 20th day of January, 1872, said note and mortgage were fully paid off, with the interest that had accrued thereon, except the sum of eighty-six dollars and eighty-four cents; that, on said last named day, the plaintiff tendered to and offered to pay the appellant the said sum of eighty-six dollars and eighty-four cents, and even more than was due upon said note and mortgage, to wit, the sum of ninety dollars, and demanded of him a surrender of said note and mortgage, and satisfaction of said mortgage, so as to remove the incumbrance then resting upon said real estate, either and all of which the appellant refused and failed to do, and then held said note in his possession, and said mortgage in full force upon said real estate, so far as was shown by the records of mortgages and by the mortgage itself, all of which the plaintiff averred to be unlawful and wrongful; that he had complied and offered to comply, fully, with his part of said contract, and was then entitled to the surrender of said note, and the full satisfaction of said mortgage; that he then brought into court, as a continuance of said tender, and for the use of the appellant, the said sum of ninety dollars, and he asked a judgment and decree of the court below, that said mortgage was fully satisfied and the lien thereof discharged from said land, and that the appellant be ordered and directed to surrender said note to the plaintiff, or, in default thereof, that said note be declared null and void in appellant's hands, with costs of suit and proper relief.

In the second paragraph of his complaint, the plaintiff alleged substantially the same facts, in the same words, as to the execution of the same note and same mortgage, and as to the payment in full of said note and mortgage prior to the 20th day of January, 1872, except, as averred in this paragraph, as to the sum of twenty-one dollars and four cents, for that the said note, as to the sum of forty dollars, was usurious and void, for that the said note was given for the sum of two hundred dollars, only, and to

Bowen v. Phillips, Adm'r, et al.

that sum was added for the period of two years, twenty per cent. interest, which was added to the principal, making the note call for two hundred and eighty dollars; that the plaintiff considered that ten per cent. interest, of the interest in the note, might then be legal and valid; that, deducting the said forty dollars usury, and the interest accrued on it, there was then due on said note and mortgage only the sum of twenty-one dollars and four cents; that, on said 20th day of January, 1872, the plaintiff tendered and offered to pay to appellant said sum of twenty-one dollars and four cents, and even more than was due him upon said note and mortgage, and demanded of him a surrender of said note and mortgage, and a satisfaction of said mortgage, so as to remove the incumbrance then upon said real estate; either and all of which appellant refused and failed to do, and then held said note in his possession and said mortgage in full force on said real estate, so far as was shown by the mortgage records and the said mortgage, all of which the plaintiff averred to be unlawful and wrongful; that he had complied and offered to comply, fully, with his part of said contract, and was then entitled to the full satisfaction of said mortgage, and the surrender of said note; that he then brought into court, as a continuance of his said tender, and for the use of the appellant, the said sum of twenty-one dollars and four cents, and the plaintiff demanded the same judgment as in the first paragraph of his complaint.

To each paragraph of plaintiff's complaint the appellant demurred separately, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrers were overruled by the court below, and to these decisions the appellant excepted.

The appellant answered the entire complaint by a general denial of the matters alleged therein, and also filed three additional paragraphs of answer to the second paragraph of the complaint.

In the second paragraph of his answer, the appellant

Bowen v. Phillips, Adm'r, *et al.*

said, in substance, that he admitted that the consideration of the note, described in the second paragraph of the plaintiff's complaint, was two hundred dollars, and that interest for two years, amounting to eighty dollars, was added to said consideration, and said note was executed for said principal and added interest; but appellant averred, that, after the note became due and payable, to wit, on April 7th, 1866, the plaintiff, for the said loan and use of said principal, voluntarily paid appellant the said added interest of eighty dollars, and also the interest which had accrued on said note after its maturity; and the appellant alleged that the said sum of two hundred dollars, and the interest thereon from the date of said payment of said interest, were then due and unpaid, wherefore the appellant demanded judgment for costs.

In the third paragraph of his answer, appellant said, in substance, that he admitted that the plaintiff executed and delivered to appellant the note and mortgage mentioned in said complaint, and that the appellant was the owner and in possession thereof; and appellant also admitted that the only consideration of said note was the sum of two hundred dollars, and that the sum of eighty dollars was added to said consideration by the mutual agreement of said parties, for the use of said two hundred dollars by plaintiff for two years; but the appellant averred, that, on April 7th, 1866, the plaintiff voluntarily paid the appellant the said interest, in money, and also the interest accrued on said note to that time; and appellant further averred, that said sum of two hundred dollars, "the real and recognized principal" in said note, with interest thereon from the date of said payment of interest, was then due and unpaid, and appellant demanded judgment for costs.

And in the fourth paragraph of his answer, the appellant said, in substance, that he admitted that the plaintiff executed and delivered to appellant the note and mortgage mentioned in said complaint, and that appellant was the

Bowen v. Phillips, Adm'r, et al.

owner of said note and mortgage, and, also, that the plaintiff made the appellant a tender of twenty-one dollars and four cents, as plaintiff had alleged, but the appellant averred, that the consideration of said note was the sum of two hundred and twenty-one dollars and eighty-four cents, and that the sum of fifty-eight dollars and sixteen cents was added to said consideration by the mutual agreement of the parties thereto, for the use of the said sum of two hundred and twenty-one dollars and eighty-four cents, by the plaintiff, for two years from the date of the note; and the appellant further averred, that afterwards, to wit, on the 7th day of April, 1866, the plaintiff voluntarily paid, in money, to the appellant, said fifty-eight dollars and sixteen cents interest contracted for, and the interest accrued on said note from its maturity to the date of said payment, and also the sum of twenty-one dollars and eighty-four cents of the principal of said note, leaving due the appellant, at that date, the sum of two hundred dollars, which sum, with interest thereon from April 7th, 1866, was then due and owing to the appellant, and therefore the appellant demanded judgment for costs.

The plaintiff demurred to each of the second, third and fourth paragraphs of the appellant's answer, separately, for the want of sufficient facts in either paragraph to constitute a defence to plaintiff's action, which demurrer was sustained by the court below as to each of the said paragraphs, and the appellant excepted.

The cause was tried by the court below, without a jury, and the trial resulted in a finding, by the court, that the material allegations of plaintiff's complaint were true, and that he was entitled to the relief demanded in his said complaint. And, over appellant's motion for a new trial, overruled, and exception saved, a judgment and decree were rendered by the court below, in accordance with its said finding. The evidence is not in the record.

In this court, the appellant has assigned, as alleged

Bowen v. Phillips, Adm'r, *et al.*

errors, the several decisions of the court below, in overruling his demurrer to each paragraph of the plaintiff's complaint, and in sustaining the plaintiff's demurrer to each of the second, third and fourth paragraphs of appellant's answer to the second paragraph of the plaintiff's complaint.

In his brief of this cause, in this court, the appellant's counsel says:

"The error assigned, on the ruling on the demurrer to the complaint, is not insisted on by the appellant. But it is insisted that it was error to sustain the demurrer to the second, third and fourth paragraphs of the answer."

Therefore, we regard the alleged errors assigned upon the decisions of the court below, overruling the demurrer to each paragraph of the complaint, as expressly waived by the appellant, and we shall consider and decide only such questions as are fairly presented by the alleged erroneous rulings of the lower court, on the several affirmative paragraphs of the appellant's answer.

The questions presented involve the consideration of the several statutes of this State, regulating interest on money, for the last quarter of a century. The note and mortgage were executed when "An act concerning interest on money," approved May 27th, 1852, (1 G. & H. p. 406) was in force; the payment, alleged by the appellant to have been made by the plaintiff on said note and mortgage, on the 7th day of April, 1866, if made then, was made when "An act to amend the 5th and 6th sections of an act regulating interest on money," etc., approved December 19th, 1865, (3 Ind. Stat., p. 316) was in force; and this action was commenced and prosecuted to judgment, in the court below, when "An act concerning interest on money, and to provide for recoupment of usurious interest," approved March 9th, 1867, (1 R. S. 1876, p. 599, note 2,) was, as it still is, a part of the law of this State.

It was alleged in the complaint, and admitted in the answer, that interest for two years, at the rate of twenty

Bowen v. Phillips, Adm'r, et al.

per centum per annum, was included in and formed a part of the amount of the note. By the act of May 27th, 1852, *supra*, in force at the date of said note, to wit, March 21st, 1859, the legal rate of interest, upon the loan of money, was "six dollars a year, upon one hundred dollars," and it was provided that "no greater rate of interest shall be taken, directly or indirectly."

By the 4th section of this act, it was provided as follows:

"Sec. 4. If a greater rate of interest than is hereinbefore allowed, shall be contracted for, or received, or reserved, the contract shall not therefore be void; but if in any action on such contract, proof be made, that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the defendant shall recover costs; and the plaintiff shall recover only his principal without interest; and if interest shall have been paid thereon, judgment shall go for the principal, deducting interest paid." 1 G. & H., p. 408.

By the 51st section of "An act defining misdemeanors and prescribing punishment therefor," approved June 14th, 1852, which section was in force at the time of the execution of said note and mortgage, it was provided as follows:

"Sec. 51. Any person who shall directly or indirectly, bargain for, receive or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law, shall be fined in five times the interest so unlawfully bargained for, taken or reserved, and in any prosecution under this section, it shall not be necessary to set forth the contract or instrument by which such interest may have been bargained for, received or reserved." 2 G. & H. 472.

In their inception, therefore, the said note and mortgage, in so far as the included interest therein was concerned, were executed and received, clearly and confessedly, in

Bowen v. Phillips, Adm'r, et al.

direct violation of the then existing laws of this State, both civil and criminal.

By an act passed March 7th, 1861, regulating interest on money, etc., the act of May 27th, 1852, *supra*, and the 51st section of the misdemeanor act, *supra*, were both repealed. 2 G. & H. 656. By the act of March 7th, 1861, *supra*, much of the act of May 27th, 1852, was merely reenacted, but in lieu of section 4, before cited, of the latter act, sections 5 and 6 were enacted as follows:

"Sec 5. If a greater rate of interest than is hereinbefore allowed" (to wit, six per cent. per annum,) "shall be contracted for, or received or reserved, the contract shall not therefore be void, but if in any action on such contract, proof be made that interest at a rate exceeding six dollars a year on one hundred dollars has been directly or indirectly contracted for, or taken or reserved, the plaintiff shall recover only his principal with six per cent. interest, and he shall also recover costs, and if 'a greater rate of interest than six dollars a year for one hundred dollars shall have been paid thereon, whether in advance or not, judgment shall be rendered only for the amount of principal, deducting the excess of interest thus paid, at the time paid.'

"Sec. 6. If in any action on any contract in which illegal interest shall have been directly or indirectly contracted for, or taken or reserved, the defendant shall have, previous to the commencement of the suit, tendered to the plaintiff his principal, with legal interest, or if illegal interest shall have been paid, the principal with legal interest, deducting the illegal interest paid, the defendant shall recover costs, and the plaintiff shall recover only the amount tendered." 2 G. & H., p. 657.

By comparing these two sections with section 4, before cited, of the act of May 27th, 1852, *supra*, and considering, also, the repeal of the 51st section of the misdemeanor act by the same act in which these two sections were found, it will be seen that all forfeiture and punish-

Bowen v. Phillips, Adm'r, et al.

ment for contracting for, taking or reserving usurious interest, were abolished by the act of March 7th, 1861, *supra*, that only legal interest could be recovered by law, on a usurious contract, and that, if usurious interest had been paid, the defendant, in a suit on such contract, could recoup only the excess over legal interest.

The effect of the act of March 7th, 1861, *supra*, upon usurious contracts entered into before the passage of that act, while the statutes of 1852, before cited, both civil and criminal, were the law on the subject of usury, was considered by this court, in the case of *Wood v. Kennedy*, 19 Ind. 68. In that case, PERKINS, J., said:

"The change made in the interest law, then, by the act of 1861, is mainly in relieving from penalties, or consequences in the nature of penalties, and is not one impairing the obligation of the terms of the contract, but rather enforcing, or validating them. In such cases, the law in force, at the time the remedy is sought upon the contract, governs."

And the case last cited was approved and followed by this court, in the case of *Shockley v. Shockley*, 20 Ind. 108.

By an act approved December 19th, 1865, before referred to, the 5th section, before cited, of the act of March 7th, 1861, *supra*, was so far amended as to provide, "that in all cases in which money or any other thing of value shall have been voluntarily paid as interest for the loan, use, or for usance of money, the same shall not be recovered back, either directly or by any [way] of set-off, or counter-claim or payment." 3 Ind. Stat. 316.

And by the same act of December 19th, 1865, *supra*, the 6th section, before cited, of the said act of March 7th, 1861, was amended to read as follows:

"Sec. 6. If, in any action on any contract in which illegal interest shall have been directly or indirectly contracted for, the defendant shall have, previous to the commencement of the suit, tendered to the plaintiff his principal with legal interest, the defendant shall recover

Bowen v. Phillips, Adm'r, et al.

costs, and the plaintiff shall recover only the amount tendered." 3 Ind. Stat. 317.

It was while these amended sections were the law on the subject of usurious interest, to wit, on the 7th day of April, 1866, as the appellant alleged in the several paragraphs of his answer, that the plaintiff voluntarily paid the appellant the interest at the rate of twenty per cent. per annum, on said note and mortgage. If this suit had been commenced and prosecuted to judgment, while those amended sections were the law on the subject of usury, it is very evident that the plaintiff could not have recouped any part of the excessive interest paid by him.

But before this action was commenced, an act was passed, which has since been, and still is, the law of this State, entitled "An act concerning interest on money, and to provide for recoupment of usurious interest," approved March 9th, 1867, *supra*.

The 1st section of this act provided, that six per cent. per annum should be the legal rate of interest, unless the agreement to pay a higher rate of interest was in writing and signed by the party to be charged; "but such rate of interest shall in no case exceed the rate of ten dollars a year on one hundred dollars."

The 2d section of said act is as follows:

"Sec. 2. All interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal, as to the excess only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant whenever it has been reserved or paid before the bringing of the suit: *Provided*, that nothing herein contained shall affect the loan of public funds, nor interest on purchase-money of canal, college, school or saline funds." 1 R. S. 1876, p. 599, note 2.

This court has repeatedly held, that the act of March 9th, 1867, *supra*, was applicable to pre-existing contracts, to the extent of making such contracts for the

Hutts v. Williams.

payment of interest at the rate of ten per cent. per annum legal and valid. *Sparks v. Clapper*, 30 Ind. 204; *Pattison v. Jenkins*, 33 Ind. 87; *Highfill v. McMickle*, 39 Ind. 270.

Is there any reason, either in law or ethics, why the 2d section of the act of March 9th, 1867, should not also be held to apply to pre-existing contracts, so far forth as may be necessary to enable an unfortunate debtor to recoup from his creditor the unreasonable and illegal portion, at least, of the usurious interest paid,—even where the payment was made at a time when the law did not permit the recoupment of the excess paid, over legal interest? We know of no such reason. In our opinion, the law in force at the time the remedy is sought governs, as well, as to the recoupment of usurious interest paid, as to the recovery of the rate of interest contracted. And where, as in this case, as the plaintiff alleged and the appellant confessed, the debtor had paid and tendered the entire principal of the debt, and also the very highest rate of interest thereon ever countenanced or tolerated by the laws of this State,—in our opinion, equity, good conscience, and the strict letter of the law, all sanction and approve of the finding and judgment of the court below.

We find no error in the record of this cause.

The judgment of the court below is affirmed, at appellant's costs.

HUTTS v. WILLIAMS.

SUPREME COURT.—*Appeal.—Cause Commenced Before Justice.—Set-Off.—*

Where, in an action commenced in the court of a justice of the peace, and appealed to the circuit court, to recover for a sum less than ten dollars, the defendant files a set-off for an amount exceeding that sum, an appeal lies to the Supreme Court from a judgment rendered therein.

Hutts v. Williams.

SAME.—Costs.—Presumption.—Witness.—Where the fees of witnesses subpoenaed, but not used, by the successful party are taxed to the losing party as costs, on appeal to the Supreme Court, it will be presumed, where the evidence is not in the record, that they were rightly taxed.

From the Fountain Circuit Court.

J. Ristine and *G. McWilliams*, for appellant.

H. H. Stilwell and *T. L. Stilwell*, for appellee.

BIDDLE, J.—Williams sued Hutts, before a justice of the peace, for two hundred pounds of flour, sold and delivered to him;—price, eight dollars. Hutts filed a set-off for two bushels of corn, and a sack, and twenty-five bushels of wheat;—amount, thirty-two dollars and seventy-five cents. Williams recovered judgment before the justice for eight dollars, and costs. Hutts appealed to the circuit court, wherein Williams again recovered judgment against him, for eight dollars, and costs. Hutts appealed to this court, and here Williams moves to dismiss the appeal for want of jurisdiction, because the amount in controversy, exclusive of interest and costs, does not exceed ten dollars. His motion must be overruled. Hutts appeals, and the amount claimed in his set-off is the amount in controversy here. *Little v. The Danville, etc., Plank Road Company*, 18 Ind. 86; *The Morton Gravel Road Company v. Wyson*, 51 Ind. 4.

The appellant complains because the appellee subpoenaed several witnesses and examined only one, and taxed the costs to the appellant. Perhaps he did not examine the others because the appellant offered no evidence in support of his set-off. We can not tell; the evidence is not before us, and we must presume that the court was right. *Leyner v. The State*, 8 Ind. 490; *Fromer v. The State*, 49 Ind. 580.

The judgment is affirmed, with costs and ten per cent. damages.

Reeder et al. v. Maranda et al.

REEDER ET AL. v. MARANDA ET AL.

55	239
132	109

SUPREME COURT.—Practice.—Appeal.—Notice of.—Where an appeal to the Supreme Court is taken by one of several defendants, without notice thereof to the others, it will be dismissed.

From the Tipton Circuit Court.

D. Moss, for appellants.

J. Green, D. Waugh and J. Waugh, for appellees.

Howk, J.—In this action, appellee, George Maranda, was the sole plaintiff, and the other appellees, the appellants and divers other persons, were the defendants in the court below. And such proceedings were had in said action as that, by the consideration of the court below, the appellee, George Maranda, recovered a joint judgment against the other appellees, the appellants and one Alfred Bess, for a certain sum of money. From this judgment the appellants have appealed to this court, and the appellees, other than said Maranda and said Alfred Bess, did not join in said appeal. The appellants have served notice of this appeal on all the appellees other than said Maranda; but the appellants have failed to serve notice of this appeal on said Alfred Bess, a co-party and judgment codefendant with said appellants. Appellee George Maranda insists, that, for this failure of the appellants, either to make said Alfred Bess a party to their appeal, or to serve notice of this appeal on said Alfred Bess, their appeal ought to be dismissed.

This point is well taken. For their non-compliance with the requirements of section 551 of our code of practice, 2 R. S. 1876, p. 239, and in conformity with the well established practice of this court, as settled by many decisions thereof, which we need not cite, this appeal of the appellants is dismissed, at their costs

Shanklin v. The City of Evansville.

SHANKLIN v. THE CITY OF EVANSVILLE.

REAL ESTATE.—Action to Quiet Title.—Cities and Towns.—Public Street.—

Dedication.—The owner of certain real estate within the limits of a city laid it out in lots and streets, as an addition to such city, and prepared, and caused to be recorded in the recorder's office of the county wherein it was situated, a plat designating the different lots and streets and their dimensions, and sold and conveyed certain of such lots, fronting upon one of such streets, to persons who made valuable improvements thereon; and such city, after permitting such street to be used for the bed of a canal, upon the abandonment of the latter, caused it to be filled up, improved and used as a public street.

Held, in an action by such owner, against such city, to quiet the title in him to such street, that he had dedicated the same to the use of the public, and can not recover.

From the Vanderburgh Circuit Court.

A. Dyer, for appellant.

A. Iglehart and *J. E. Iglehart*, for appellee.

PERKINS, J.—We take the statement of the case and the special finding of the court, from the printed brief of appellant, after comparison with the record:

“This was an action brought by the appellant, against the appellee, to quiet title to certain real estate in the city of Evansville, described in the complaint. The complaint is special in its allegations, which are to the effect that the plaintiff was, in 1837, the owner of certain land therein mentioned, and that, at that time, he platted the same as an enlargement to the city. A copy of the plat is made an exhibit to the complaint, and it is alleged that the space between blocks 3, 8, 15, 20, 42 and 47, on the one side, and 4, 7, 16, 19, 43 and 46, on the other, and marked ‘Central Canal,’ excepting eighteen and three-fourths feet on each side thereof, was, by the said platting and the recording of said plat, dedicated to the use of the Wabash and Erie Canal, and that a canal had been constructed therein, but had been long since abandoned, whereby the space described and so dedicated had reverted to the plaintiff. And that the defendant pretends to

Shanklin v. The City of Evansville.

claim some interest and is disturbing the plaintiff's possession.

"The defendant answered in two paragraphs, both special, admitting that the plaintiff was the owner of the lands mentioned; that he platted the same and recorded the plat, and that the canal was afterwards built, used and abandoned, substantially as alleged, but that the whole space between the said several blocks, being ninety-seven feet in width, was, by said plat, dedicated, not to the use of the canal, but to the use of the city, as and for a street, and in which the canal might be constructed; and that, by the terms of the schedule attached to said plat, said space was designated as 'Central Canal Street, ninety-seven feet wide,' and the same thereby became a public street. And that, after said abandonment, the city, in the year 1854, filled up said canal, and commenced, and had continued from that time to the present, to occupy and use as a street said space; that the same had been improved and had had placed thereon sidewalks, and had buildings and improvements abutting thereon as a street; and that the plaintiff had long since sold and conveyed his interest in all the lots abutting upon said street, and that all his interest therein was thereby extinguished.

"After a demurrer, assigning the want of sufficient facts, was overruled, the plaintiff filed a reply in denial.

"The case was submitted to the court, which, in addition to the general finding for the defendant, at its request found specially as follows:

"1st. That, prior to the 16th day of October, 1887, the plaintiff was the owner in fee of the tract of land in controversy in this suit.

"2d. That, on that day, the plaintiff, with Robert M. Evans and others, adjoining proprietors, laid off, by proper metes and bounds, "The Eastern Enlargement of the City of Evansville," which included the tract of land claimed by plaintiff in this suit, in town lots, streets and

Shanklin v. The City of Evansville.

alleys, and platted and recorded the same in the recorder's office of Vanderburgh county; that, since the recording of said plat of said enlargement of the city of Evansville, the plaintiff has sold and conveyed to others one-half of the lots, marked and designated on said plat, adjoining the land claimed by the plaintiff in this suit, and still owns the other half of said lots.

“‘3d. That the tract of land in controversy, that is, that part of land designated on said plat of The Eastern Enlargement of the City of Evansville as Canal street, was, soon after it was platted and recorded, with the consent of the defendant, used and occupied by the Wabash and Erie Canal as the southern terminus of said canal in the city of Evansville; that the canal was abandoned, and about the year 1854 the defendant commenced filling up the same, and continued from year to year thereafter filling, until it was completed from Second to Eighth streets, about the time or shortly before the commencement of this suit, and that a number of the purchasers of lots on said Canal street have erected buildings, including a valuable public school-house, fronting on said Canal street, and that said Canal street has, since the defendant commenced filling up the same, been kept open and improved by the defendant as a public street, and so used and treated by the public.

“‘And I find, as a conclusion of law upon the facts above found, that there was a dedication by the plaintiff, to the public, of the real estate in the plaintiff's complaint mentioned, as a public street, and that the defendant is entitled to the possession of the same, to be kept open, improved and maintained as a public street.’”

We think the conclusion of law, upon the special finding of facts, is correct.

Affirmed, with costs.

Goodwin v. Owen et al.

GOODWIN v. OWEN ET AL.

DESCENTS.—Adultery of Wife.—Widow.—Where a wife has abandoned her husband, and, at the time of his death, is living in adultery, the 32d section of the statute of descents, of this State, prevents her from inheriting any part of his estate.

SAME.—Statute Construed.—Habitual, illicit intercourse of the wife with men, no difference *with whom* in particular, or *where*, is a "living in adultery" within the meaning of such section.

SAME.—Posthumous Child.—Mother.—If a woman who was "living in adultery" at the decease of her husband gives birth to a legitimate posthumous child, begotten by him, it will inherit from such decedent, and, on its death, she will inherit from her child.

REAL ESTATE.—Action to Quiet Title.—Mortgage.—Assignment.—Foreclosure.—Principal and Agent.—A., to procure the loan of a sum of money, signed and acknowledged a mortgage on his real estate, securing a promissory note for such sum, also signed by him, and both payable to B., who had promised that, upon the execution and delivery of these instruments, he would make such loan to A.; these instruments were delivered to C., who was to present them to B., procure such loan, retain thereof a sum for services yet to be performed by him for A., and pay over to the latter the remainder; C. presented them to B., who declined to accept them or to make such loan to A., but, as C. was indebted to B., in a sum equal to the amount to have been retained by C., B. proposed to assign such note to C., grant the latter an extension on his debt, and loan him a sum of money equal to the excess of A.'s note over such debt, if C. would execute to B. a promissory note for the amount of such loan to C., which proposal was accepted by the latter, and executed by both, and C. placed such mortgage on record; subsequent to the signing, but prior to the assignment and recording of such mortgage, A., for a valuable consideration, conveyed such realty, by a quitclaim deed, to D., against whom C. brought suit to foreclose such mortgage.

Held, that no legal delivery of such note and mortgage had been made to B., that his assignment thereof to C. was ineffectual, and that D. was entitled to a decree quieting his title against such mortgage.

From the Hendricks Circuit Court.

G. H. Goodwin, for appellant.

L. M. Campbell, for appellees.

PERKINS J.—Suit to foreclose a mortgage, executed by Jennie A. Owen to James Nealis, on the east half of the south-west quarter of section nineteen; also, a fractional part of the east half of the north-west quarter of section

Goodwin v. Owen et al.

thirty, and bounded as follows: Beginning at the north half-mile stake of said section, thence west with the section line, twenty-two rods and ten links; thence, south, fifty-two degrees east, thirty-one rods, to the half section line; thence north with the half section line, to the place of beginning; all in township seventeen, north, range two, west, in Hendricks county, Indiana, estimated to contain eighty-two acres and sixty one-hundredths of an acre, to secure the payment of a note of one thousand dollars, etc. It is averred that the mortgage was duly recorded. The other defendants were made parties on account of their interest in the property mortgaged. The defendant Jennie made default.

Charles Owen, an infant, by his guardian *ad litem*, answered:

1st. The general denial;

2d. That said Charles is the sole owner of said land, by inheritance from William B. Owen, deceased, late his father; that his codefendant Jennie A. Owen, widow of said William B. Owen, deceased, had no right in or title to said lands, at the date of the mortgage; and,

3d. That prior to his decease, said Jennie had abandoned said William B. Owen, her husband, and, at the time of his death, was living in adultery with one James P. Miller and others, at a house of ill fame, in the city of Indianapolis.

He further averred that said mortgage was executed without consideration, and fraudulently.

Horatio Owen, another of the defendants, answered:

1st. The general denial;

2d. That at the date of the mortgage sued on, said Jennie A. Owen had no title to or interest in the lands described in it. That the land had been owned by William B. Owen, deceased, the husband of said Jennie, and father of said defendant Charles; that at his death he left no other heirs; that prior to said William's death his wife, Jennie, had abandoned him, and was, at the time of

Goodwin v. Owen et al.

his death, living in adultery with one James P. Miller and others, at a house of ill fame, in the city of Indianapolis, which was well known to plaintiff; that this defendant, Horatio Owen, had purchased the interest of said Jennie, and was the owner thereof; that said mortgage was fraudulent, and without consideration.

The affirmative paragraphs of the above answers were demurred to for want of sufficient facts, and the demurrers were overruled, and exceptions taken.

The cause was submitted to the court for trial, and the court, at the request of the parties, made a special finding, as follows:

“ William B. Owen died in Hendricks county, Indiana, on the 12th day of June, 1874, seized in fee-simple of the lands described in the mortgage, which is an exhibit and made a part of the complaint, and leaving surviving him, his widow, the defendant Jennie A. Owen, and one child, the defendant Charles Owen. After the death of the said William B. Owen, to wit, on the 30th day of July, 1874; said widow, Jennie A. Owen, gave birth to a legitimate child by the said William B. Owen, which lived until the 12th day of August, 1874, on which day it died. On the 20th day of June, 1874, the defendant Jennie A. Owen, at Jamestown, in Boone county, employed the plaintiff as her attorney to attend to her interest, generally, in the settlement of her husband's estate, and executed to him a general power of attorney to act as her agent in the business. She contracted to pay the plaintiff five hundred dollars (\$500.00), as a fee for his services, for the payment of which plaintiff demanded security. Being without means, said defendant Jennie A. Owen requested the plaintiff to help her raise money to pay his fee, and upon which she could subsist till she could get money from her husband's estate. It was agreed that he would effect a loan for her from James Nealis, of one thousand dollars (\$1,000), of which amount he was to retain five hundred dollars (\$500), his fee as

Goodwin v. Owen *et al.*

her attorney, she agreeing to secure the loan by a mortgage on her interest in her late husband's real estate. Plaintiff, about this time, saw Nealis, and told him he wanted the money, and how it was to be secured, who told the plaintiff he would furnish the money.

"Pursuant to this arrangement, the plaintiff went to Indianapolis, on the 7th day of August, 1874, and met the defendant Jennie A. Owen, at which date she executed the note for one thousand dollars, described in the complaint, payable to said Nealis, and the mortgage on said real estate, which is a part of the complaint.

"The plaintiff returned to Jamestown with the note and mortgage, and deposited them in his office, and went on a business tour to the State of Kentucky. Immediately on his return home, he took the note and mortgage and went to Lebanon, Indiana, and, on the 21st of August, 1874, presented them to Nealis and asked him for the money. Nealis told plaintiff he did not know the woman, or about the title to the land, and declined to advance the money to the defendant Jennie A. Owen, upon the mortgage, but said he would let the plaintiff have the money, taking plaintiff's individual note, and would assign the note and mortgage of defendant Jennie A. Owen to plaintiff, to which plaintiff assented.

"Nealis thereupon let the plaintiff have five hundred dollars, cash, taking his note therefor, and gave him an extension on another five-hundred-dollar note, which he already held against plaintiff. Five hundred dollars was all the money advanced to plaintiff by Nealis.

"Plaintiff has since repaid this money, five hundred dollars, to Nealis, and taken up the note he then gave for it. Of this five hundred dollars, he paid small sums to the defendant Jennie A. Owen, at various times, but the aggregate amount of said sums does not appear. Plaintiff had the mortgage recorded on the 1st day of September, 1874. On the 18th day of August, 1874, said Jennie A. Owen, in consideration of one hundred and fifty dollars,

Goodwin v. Owen et al.

paid her by the defendant Horatio Owen, executed and delivered to him, said Horatio, a quitclaim deed, conveying to him all her right, title and interest in and to the premises described in said mortgage.

“Before the death of said William B. Owen, to wit, on or about the 2d day of June, 1874, his wife, the said defendant Jennie A. Owen, abandoned her said husband, without cause to justify her so doing, and never returned to his home. During a time immediately preceding said abandonment, said Jennie A. Owen was guilty of various acts of adultery with one James P. Miller, and said abandonment was pursuant to an arrangement with said Miller, who preceded her to Indianapolis and made arrangements for a boarding place for her, met her at the depot and conducted her to said boarding-house. At the time of the death of said William B. Owen, said Jennie A. Owen was at the house to which said Miller conducted her, and, although not living with said Miller, was maintained by, and continued her adulterous intercourse with, him.

“And from the foregoing facts, the court finds the following conclusions of law :

“1st. That said defendant, Jennie A. Owen, took no interest in said real estate, upon the death of said William B. Owen, as his widow, but that said real estate descended to the two children of said marriage.

“2d. That upon the death of said posthumous child, said Jennie A. Owen inherited the fourth part of said real estate, as its heir at law.

“3d. That the mortgage executed by said Jennie A. Owen, to said Nealis, never became operative and effective to create a lien upon said real estate ; 1st, because the same was not delivered to said Nealis till the 21st day of August, 1874, after the conveyance of said Jennie A. Owen to said Horatio Owen ; and 2nd, because said Nealis never did accept said mortgage, or make any advancement upon its security, and took thereby no interest

Goodwin v. Owen et al.

in or lien upon said real estate, which he could assign to the plaintiff. LIVINGSTON HOWLAND, Judge.

“To which findings of fact, and conclusions of law thereon, the plaintiff excepts.”

The court rendered judgment for the plaintiff, on the note, and a decree cancelling the mortgage as void, in accordance with the prayer of one of the paragraphs of answer by way of counter-claim.

The plaintiff below is the appellant in this court.

The rulings of the court upon the demurrers to paragraphs of answers, and the conclusions of law upon the facts found by the court, are assigned for errors, in this court.

We will first examine the question as to the interest of Jennie A. Owen in the real estate.

It appears that William B. Owen was the owner of the land in question, on the 12th day of June, 1874; that, on the 2d day of that month, his wife, said Jennie, abandoned him, without cause, and was, at the time of his death, living in adultery, in the city of Indianapolis, Indiana; that the mortgage sued on is dated on the 7th day of August, 1874, the day it was signed and acknowledged; and that, on the 18th day of August, 1874, said Jennie executed a deed for her interest in the real estate of her deceased husband, being the real estate described in the mortgage, to Horatio Owen, one of the defendants in this suit.

Section 32 of our statute of descents, 1 R. S. 1876, p. 413, enacts, that,

“If a wife shall have left her husband, and shall be living at the time of his death, in adultery, she shall take no part of the estate of her husband.”

It is claimed that this statutory enactment does not embrace a case like the present.

We think it would be in disregard of the true intent and meaning of this section of the statute,—would, in fact, render it nugatory, to give it a construction that

Goodwin v. Owen et al.

would exclude from its operation such cases as the one now before us. See *Gaylor v. McHenry*, 15 Ind. 388; *Shaffer v. Richardson's Adm'r*, 27 Ind. 122.

The language of the section will be noted. It does not specify how or where the wife shall be living in adultery; it does not say that she shall be living in adultery with some particular person, at some particular place; but, only, that she shall be living in adultery. In this case, she was living in a room provided for her by her paramour, in which she was supported by him, and where he, and probably other men, had habitual illicit intercourse with her. Living in adultery means living in the practice of adultery. In this case, the evidence shows that she was living in the continuous practice of open adultery. If it does not show a living by her in open adultery, it will be difficult to find a case of such living.

This point being established, it follows that Jennie A. Owen took nothing of her husband's real estate. But it appears, by the special findings, that one of his and her children died on the 12th of August, 1874, from which child the law did not disable her to inherit. She took a fourth part of said real estate from the deceased child. On that part, her valid conveyances would operate; and if the mortgage was a valid instrument, it attached as a lien upon one-fourth of said mortgaged premises.

Was the mortgage a valid instrument, in the hands of appellant? Jennie A. Owen employed appellant as her attorney, and was to pay him five hundred dollars. Appellant wanted this money paid, and Jennie wanted five hundred dollars for her own subsistence, and it was agreed that a thousand dollars should be borrowed of Nealis, on her note, secured by the mortgage, signed by her, on the premises. Nealis refused to loan the money on the mortgage, never accepted it as a security, and never advanced any money upon it. It was not executed to the appellant to secure him his fee, and he never, so far as appears, advanced but a nominal sum to Jennie, the

Lowrey, Adm'r'x, v. The City of Delphi.

mortgagor, for her support. Under these circumstances, is the mortgage a valid instrument, in the appellant's hands, as against the owners of the real estate who contest it? As we have seen, Jennie makes default. In our opinion, the mortgage never came into being as an operative instrument. It was signed, to be delivered to the mortgagee, on his loaning a sum of money. The mortgagee refused to accept the mortgage and loan the money. He never acquired any property in the mortgage, and, of course, could transfer none to the plaintiff. The mortgage was never *in esse*.

The conclusion of the circuit court was correct, and the judgment must be affirmed, with costs.

Affirmed, with costs.

LOWREY, ADM'R'X, v. THE CITY OF DELPHI.

CITIES AND TOWNS.—*Death Caused by Negligence.—Pleading.—Street.—Bridge.—Failure to Repair.—Statutes Construed.—Presumption.—Evidence.—Wabash and Erie Canal.—Decedents' Estates.*—In an action against a city, by the administrator of a decedent, to recover damages for his death, resulting from an injury alleged to have been caused by the negligence of the defendant, the complaint alleged, that, at a point in such city, where a public street thereof crossed the Wabash and Erie Canal, she had negligently permitted a bridge across such canal to become and remain so out of repair, for a period of two months prior to and until decedent's death, that it could not be travelled upon, of which defendant's agents had notice; that she had also permitted such street to be so used, upon both sides of such canal, upon one side of such bridge, as to present the appearance of a fording place used by the travelling public; but that, in fact, owing to excavations in the bed of the canal, concealed beneath the water thereof, such place was not and could not be used as a ford; that such decedent, not knowing of the danger, and deceived by such appearances, in travelling upon such street, and intending to cross such canal, drove his horse, attached to the buggy in which he was seated, down such apparent fording place, into such canal, where, "without fault upon his part," by means of such excavations, he received the injury which

Lowrey, Adm'r'x, v. The City of Delphi.

caused his death; that plaintiff was duly appointed administratrix of the estate of the decedent, who left a widow and heirs.

Held, upon demurrer, that the complaint is sufficient.

Held, also, that, in the absence of any allegation to the contrary, such city is presumed to have been incorporated under the general law of this State for the incorporation of cities.

Held, also, that the complaint shows that the decedent was injured at a point upon a public street of such city, and within her limits.

Held, also, that, under the 61st section of the act of March 14th, 1867, providing for the incorporation of cities, etc., (1 R. S. 1876, p. 300,) such city was bound, exclusively, to keep in repair such bridge across such canal.

Held, also, that the act of January 27th, 1847, in relation to the Wabash and Erie canal, (acts 1847, p. 33,) does not authorize nor bind the trustees thereof to keep in repair any bridge across such canal, upon any public street within the limits of a city.

Held, also, that, under the allegations of such complaint, including the one that the decedent received such injuries "without fault on his part," the plaintiff could introduce evidence that such decedent had been guilty of no contributory negligence.

From the Carroll Circuit Court.

J. H. Gould, for appellant.

L. E. McReynolds, for appellee.

Howk, J.—In this action appellant was plaintiff, and appellee was defendant, in the court below. The complaint was in two paragraphs. Appellee demurred separately to each paragraph of the complaint, for the want of sufficient facts therein to constitute a cause of action. These demurrers were severally sustained by the court below, and to these decisions appellant excepted, and, declining to amend, judgment was rendered thereon for appellee, against appellant.

In this court, the errors assigned are these decisions of the court below upon the demurrers, and they present for our consideration the sufficiency of the facts stated in each paragraph of the complaint to constitute a cause of action.

In the first paragraph of her complaint, the appellant alleged, in substance, that appellee was, and for ten years last past had been, a municipal corporation, duly organ-

Lowrey, Adm'r'x, v. The City of Delphi.

ized under the laws of Indiana; that, on October 10th, 1873, and for two months next before that date, appellee negligently and carelessly permitted and suffered a certain street in said city, known as Washington street, at a point where said street crossed the Wabash and Erie Canal, and where the same was open and used for public travel, to be and remain in an unsafe and dangerous condition; that, at said point, appellee had permitted the bridge over and across said canal to become old and rotten, so that the same had fallen down, and for said two months appellee had carelessly and negligently failed to erect another bridge for the safety and convenience of persons travelling on said street; that, about four feet west of the place formerly occupied by said bridge, on each bank of said canal, and within the limits of said street, there were travelled paths of the width of the travelled path of the residue of said street, which travelled paths extended into the water in said canal, giving every appearance of a ford across said canal, as though wagons and other vehicles daily passed through said canal, whereas, said paths and tracks were worn and used by persons living in the immediate neighborhood of said canal, and who knew the depth of the water in the canal at that point, and who merely drove their wagons and other vehicles into said canal, without crossing the same; that, in the water of said canal, at said point, were large holes and excavations, which were concealed by the water in said canal and unknown to strangers, and particularly to the deceased, where the water was ten feet in depth and more, rendering it unsafe and dangerous for persons to ford or pass through; that for said two months appellee negligently and carelessly left said apparent ford exposed and open, without any railings or barriers, and without giving or posting up notices that said apparent ford was unsafe and dangerous, whereby travellers, and particularly strangers, seeing said apparent ford exposed and unguarded, were induced to believe that said canal

Lowrey, Adm'r'x, v. The City of Delphi.

was fordable at said point, and that said tracks were caused by the public in fording said canal; and appellant averred, that appellee, on said 10th day of October, 1873, and for said two months prior to said day, had full knowledge of said defects in said street, and of its dangerous condition as appellant alleged. And appellant averred, that, on said 10th day of October, 1873, the decedent, William A. Lowrey, who then and there had no notice or knowledge of said defects and dangers, was riding in a buggy upon and along said Washington street, and at said place where said street crossed said canal, and, in attempting to ford said canal, without fault on his part, and by reason of said defects in said street and the dangerous and unsafe condition thereof, the said Lowrey was greatly injured, hurt, cut, bruised, wounded and strangled, so that he then and there died. And appellant averred, that she had been duly appointed and qualified as administratrix of the estate of said William A. Lowrey, by the clerk of the circuit court of DeKalb county, Indiana; that, at the time of the happening of the injury complained of, and at the time of the death of said William A. Lowrey, appellant was his lawful wife, and that the decedent also left surviving him, as the issue of his marriage with appellant, four children, who were all infants of tender years, and were all living at the time of the commencement of this action.

The second paragraph of the complaint contains, in substance, the same averments as the first paragraph, and this additional averment: That the appellee, "for the said period of two months, negligently and carelessly failed to repair said bridge, or to give notice to the board of trustees of the Wabash and Erie Canal that said bridge across said canal had fallen down and become impassable, and failed and neglected to request or require the said board of trustees to repair said bridge, or to erect another bridge."

Lowrey, Adm'r's, v. The City of Delphi.

And the appellant demanded judgment against the appellee for ten thousand dollars, and for other relief.

This action was brought under the provisions of the 784th section of our practice act. That part of said section which relates to the subject-matter of this action reads as follows :

“ When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission.” 2 R. S. 1876, p. 309.

Where, as in this case, it is alleged that the death was caused by the wrongful omission of another, it must appear, clearly, from the averments of the complaint or paragraph, that the thing omitted caused the death, that it was wrongful, and that it was something which the other had the right and power, and was required by law, to do.

In this action, the appellant has averred, in each paragraph of her complaint, that the appellee was, and for ten years last past had been, a municipal corporation, duly organized under the laws of Indiana. It is not alleged, however, in either paragraph of the complaint that the appellee, as such corporation, had the right and power, and that it was appellee's duty, under the law, to erect bridges and keep the same in good repair, over the Wabash and Erie Canal, at the several points where the appellee's streets might cross said canal. The law under which the appellee was incorporated is not stated in either paragraph of appellant's complaint. It has been held, however, by this court, that, where a city is a party to a suit, it will be presumed, nothing appearing to the contrary, that such city is incorporated under the general law for the incorporation of cities. *The City of Logansport v. Wright*, 25 Ind. 512.

Acting upon this presumption, in this case, we must

Lowrey, Adm'r'x, v. The City of Delphi.

look to the general law of this State, providing for the incorporation of cities, etc., approved March 14th, 1867, (1 R. S. 1876, p. 267,) as the law under which the appellee was and is incorporated. By the 61st section of this general law, it was and is provided as follows:

“The common council shall have exclusive power over the streets, highways, alleys and bridges within such city, and may prescribe the height, and manner, and construction of all such bridges,” etc. 1 R. S. 1876, p. 300.

Under this law, it is evident that the appellee's power, over the bridge mentioned in each paragraph of appellant's complaint, was and is an exclusive power. Where such a power as this exists, a corresponding duty necessarily results therefrom, to keep such bridge in such good repair as the safety and convenience of the public may require. It is insisted, however, that the appellee was not bound to rebuild or repair the bridge in question, because it was a bridge over a canal which was the private property of another corporation, to wit, the trustees of the Wabash and Erie Canal, and that it was the duty of the latter corporation to keep said bridge in good repair. There would be some force in these reasons if there were any exceptions in the law we have cited, or if the laws in relation to the Wabash and Erie Canal had made it the duty of the trustees thereof to build, rebuild, or keep in repair, bridges over said canal, at the several places where the same might be crossed by the streets of an incorporated city. But there is no exception to the exclusive power conferred on cities by the general law for the incorporation thereof, before cited, in relation to or in favor of bridges over canals. Nor do the laws in relation to the Wabash and Erie Canal, or to the trustees thereof, make it the duty of said trustees to build, repair or rebuild bridges over said canal, at the places where the same may be crossed by any of the streets of any incorporated city. In the legislation of this State in relation to the Wabash and Erie Canal, by the last section of the

Lowrey, Adm'r'x, v. The City of Delphi.

act approved January 27th, 1847, it was provided, "That the said trustees shall erect, construct, and keep in good repair, suitable bridges over all State and county roads crossing, or that may hereafter cross said Wabash and Erie Canal." Acts of 1847, p. 33.

But we do not find any provision, in that or any other act of this State, making it the duty of said trustees to "erect, construct, and keep in good repair, suitable bridges" over said canal, at street-crossings in cities or towns, along the line of said canal,—and, therefore, we conclude that such a duty is not now, and never was, imposed upon the corporation owning or controlling said canal.

It is insisted also, by appellee's counsel, as to each paragraph of the complaint, that the demurrer thereto was properly sustained, because, it is said, it was not alleged in either paragraph that the Wabash and Erie Canal, at the place where the appellant's intestate was drowned, was within the corporate limits of the city of Delphi, or within the limits of a street of said city. We think, that these matters appear with sufficient certainty in each paragraph of the complaint, although not alleged in so many words. It is averred in each paragraph, that there was a street in said city, called Washington street, which crossed said canal, and that at the place of crossing there was a bridge, which was out of repair and unsafe, and that by the side of this bridge, within the limits of the street, the appearances on each bank of the canal indicated that the canal was there forded by carriages and other vehicles, and that at that place the appellant's intestate was drowned. These averments show with reasonable certainty, sufficient on demurrer, that the *locus in quo* was within the limits of a street in said city, and, of course, within the corporate limits of said city.

Again, the appellee insists, that, although the appellant has averred in each paragraph of her complaint, that her

Stearns v. Dubois.

intestate lost his life, "without fault on his part," through the carelessness and negligence of the appellee,—yet, that the other averments of each paragraph show affirmatively that the decedent was guilty of such contributory negligence, as would prevent a recovery in this action. We do not think so. In our opinion, if the appellant should prove all the other allegations of either paragraph of her complaint, on the trial, and should then establish by a preponderance of evidence that her intestate so lost his life, "without fault on his part," she would be entitled to a verdict in her favor, if no other matters were shown affirmatively, by way of defence.

The facts stated in each paragraph of appellant's complaint were sufficient to constitute a cause of action, and, in our opinion, the court below erred in sustaining the appellee's demurrer thereto.

The judgment is reversed, at the appellee's costs, and the cause remanded, with instructions to the court below to overrule the appellee's demurrer to each paragraph of the complaint, and for further proceedings, etc.

STEARNS v. DUBOIS.

EVIDENCE.—Conveyance.—Consideration.—In an a suit to recover for the price of land sold and conveyed by the plaintiff, to the defendant, the consideration expressed in the deed of conveyance may be contradicted by parol evidence.

SAME.—Quantum Valebat.—Where, in action to recover for the price of property sold by the plaintiff to the defendant, the complaint contains one paragraph based on a special contract, and another on the *quantum valebat*, under the latter the plaintiff may introduce evidence in chief of the value of such property.

SAME.—Admissions.—Practice.—Where, in such cause, under an alleged special contract as to such price, differing from that set up by the plaintiff, the defendant has testified in support thereof, and in contradiction

Stearns v. Dubois.

of the testimony of the plaintiff, the latter, at the conclusion of the evidence for the defendant, may then introduce evidence of declarations by the defendant as to such contract, differing from his own testimony, and agreeing with that of the plaintiff.

PLEADING.—*Same Cause of Action in Different Forms.*—The same cause of action may be stated in several different forms, in as many different paragraphs of a pleading, in order to meet every probable phase of the evidence to be given thereunder.

From the Franklin Circuit Court.

W. Morrow, N. Trusler and J. A. Henry, for appellant.

J. C. McIntosh, for appellee.

PERKINS, J.—Suit by appellant, against appellee, for the price and value of land sold and conveyed. The complaint contained three paragraphs, two on special contracts, and one on the *quantum valebat*. The appellant answered in four paragraphs, each to the whole complaint; the first being the general denial; the second averring that the three paragraphs of the complaint were all based upon one transaction, and that the land mentioned was sold by the acre, at sixty dollars per acre, be the quantity more or less, which was to be ascertained by a survey, etc.; the third, payment; and the fourth, set-off.

Reply in denial.

Trial by jury, verdict for appellee, new trial denied and judgment on the verdict.

On the trial, the appellant gave in evidence the deed executed by himself to appellee, which recited the consideration to be forty-five hundred dollars, and described a tract of land, by metes and bounds, and as containing sixty acres, more or less.

He then testified, as a witness, that he had sold the land to appellee for forty-five hundred dollars, detailing the terms of payment, stating how much had been paid, and how the payment was made.

Before the appellant closed his evidence in chief, he offered witnesses to prove the value of the land sold, but the appellee objected, and the court sustained the objec-

Stearns v. Dubois.

tion, and refused permission to make such proof, and appellant excepted.

The appellee, defendant, then gave his evidence to the jury. It tended to prove that the price at which the land was sold and purchased was sixty dollars an acre. The appellee was one of his own witnesses. On cross-examination he stated that appellant told him he must say, when asked what price he paid per acre, that it was seventy-five dollars; "I told him I would not tell what was not true. He then said, if Fry knew I [defendant] was getting my part of the farm for less than seventy-five dollars per acre, it would blow up the trade; that I was trading the land I got of him for forty acres of the Davis land, and it would cost me seventy-five dollars an acre, and that I could say to Fry, that, in the long run, it would cost me all of seventy-five dollars per acre, and a little more. I may have said something to Fry about seventy-five dollars per acre, but I was only to pay sixty dollars per acre for the fifty acres, and one hundred and fifty dollars off, and sixty dollars for the strip; and the amount of the purchase-money was to be ascertained by accurate measurement of the land, the number of acres was to be multiplied by sixty dollars per acre, and I to have one hundred and fifty dollars off for the trade."

After the appellee had closed his evidence, the appellant offered to prove, by competent witnesses, then in court and named to the court and sworn for the purpose, that, in a conversation with appellee, at the time the trade for the land in question was being closed, appellee stated to said witnesses that he was to pay appellant seventy-five dollars an acre for the land, and that, in another conversation, after the sale was accomplished, he stated to them that seventy-five dollars an acre was the price he did pay; but, on objection by the appellee, the court refused to permit said witnesses to testify to said conversations, to which refusal the appellant excepted.

The court refused the following instruction:

Stearns v. Dubois.

“The plaintiff asks the court to instruct the jury, that, under the issues in this cause, the deed offered in evidence by the plaintiff is the evidence by which they are to be governed in ascertaining the land sold and the amount for which it was sold.” Which instruction the court refused to give, and the appellant excepted.

Appellant also excepted to the testimony of the appellee, showing a consideration differing in amount from that stated in the deed.

The overruling of the motion for a new trial is assigned for error, and this assignment brings before us all the grounds for a new trial, mentioned in the motion therefor. Two of them, which are insisted upon, are,

1st. Admitting evidence touching the actual consideration of the deed; and,

2d. Refusing the instruction asked upon that point, which is copied above.

The court did not err in admitting evidence in respect to the consideration for the deed, nor in refusing the instruction asked.

“Parol evidence may be introduced to show that the consideration has not been paid, or that it is more or less than the amount specified, notwithstanding the recital of the amount and the acknowledgment of its receipt in the deed; not for the purpose of defeating the conveyance, but to fix the amount of the consideration. 3 Washb. Real Prop. 327; *Grout v. Townsend*, 2 Hill, N. Y., 554. Parol evidence may be given to show the real consideration of a deed, and that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated in the deed. *Allen v. Lee*, 1 Ind. 58; *Rockhill v. Spraggs*, 9 Ind. 30; *Pitman v. Conner*, 27 Ind. 337; *Robinius v. Lister*, 80 Ind. 142.” *McDill v. Gunn*, 43 Ind. 315.

Two other grounds, alleged in the motion for a new trial, were, the refusal of the court to admit proof of the value of the land under the *quantum valebat* paragraph,

Stearns v. Dubois.

and the refusal to admit proof of the admissions or declarations of the appellee as to the amount per acre he was to pay for the land. It will be observed that seventy-five dollars per acre would give an aggregate price of forty-five hundred dollars for the sixty acres, the amount named in the deed as the consideration. It would seem that the testimony offered under the *quantum valebat* paragraph should have been admitted. The fact that the parties each denied the special contract asserted by the other, certainly rendered it uncertain whether any could be proved, and it was to meet just such cases that this safety-valve, as Mr. Chitty calls it, of several counts in a declaration, paragraphs—according to the code nomenclature,—of a complaint, was devised. 1 Chit. Pl., 16 Am. Ed., p. 424.

Gould, in his Treatise on Pleading, thus states the reason for several counts in a declaration, corresponding to several paragraphs in a complaint, p. 159, sec. 4:

“One object proposed, in inserting two or more counts in one declaration, when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two or more different modes of declaring. But the more usual end proposed, in inserting more than one count, in such a case, is to accommodate the statement of the cause, as far as may be, to the possible state of the proof to be exhibited on the trial: or to guard, if possible, against the hazard of the proof’s varying materially from the statement of the cause of action: so that if one or more of the several counts should not be adapted to the evidence, some other of them may be so.”

We think the court erred in refusing to admit evidence of the value of the land.

We also think the court erred in refusing to admit evidence of the admissions of the appellee, as to what he was to pay for the land. He had answered specially that the

Noon et al. v. Lanahan et al.

price he was to pay for it was sixty dollars an acre. The appellant had replied in denial. Thus was formed one of the issues to be tried. The appellee had given evidence tending to establish the truth of his averment. His admissions to the contrary tended, in the language of some of the books, to "cut down" his evidence, not as impeaching the witness, but as the admissions of a party, —generally evidence against himself.

The judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

NOON ET AL. v. LANAHAN ET AL.

SUPREME COURT.—*Practice.*—*Bill of Exceptions.*—*Evidence.*—Where, from the record on appeal to the Supreme Court, it is apparent that all the evidence given on the trial of the cause is not contained in the bill of exceptions, the verdict or finding below will not be disturbed on a question as to the sufficiency of the evidence to sustain it.

SAME.—*Weight of Evidence.*—the verdict of a jury will not be disturbed, on appeal to the Supreme Court, on the mere weight of evidence.

From the Jennings Circuit Court.

S. E. Perkins, Jr., for appellants.

J. D. New and T. C. Batchelor, for appellees.

Howk, J.—This cause was commenced before the board of commissioners of Jennings county, Indiana, by the filing of a petition by the appellees, addressed to said board of commissioners, praying therein for the location of a certain public highway, particularly described, in Vernon township, of said Jennings county. Such proceedings were afterwards had on said petition, before said board of commissioners, as resulted in an order of said board, overruling a motion by the appellant Patrick Noon, to dismiss said petition, and appointing viewers to

Noon et al. v. Lanahan et al.

examine the proposed highway, and to report to the board whether it would or would not be of public utility. And afterwards the said viewers made a report to said board of the exact location of the proposed public highway, and that it would be of public utility. The appellant Noon then moved the board to dismiss the report of the viewers, which motion was overruled. And the appellant Noon then presented a remonstrance to the board, setting forth therein that the proposed highway was not of public utility, and that he would be damaged thereby, and praying for the appointment of reviewers to assess his damages, etc. Thereupon the board appointed reviewers, who subsequently reported to the board that they had examined the proposed highway, and that it was of public utility. And the appellant Noon moved the board to dismiss the report of the reviewers, which motion was overruled. On the separate petitions of each of the appellants, separate viewers were appointed by the board to ascertain and report the damages, if any, sustained by each of them, by the location and opening of the proposed highway. These reports were made, but neither of the appellants were satisfied therewith. Each of the appellants moved the board to set aside the report in his case, and to appoint other viewers to assess his damages, but these motions were severally overruled. And the board then made an order for the location and opening of the proposed highway, from which order the appellants appealed to the court below.

After several motions had been made and overruled in the court below, the cause was there tried by a jury, and a verdict was returned to the effect that the proposed highway would be of public utility, and that neither of the appellants would be damaged thereby. On written causes filed, the appellants jointly moved the court below for a new trial, which motion was overruled, and to this decision the appellants excepted. And a judgment was

Noon et al. v. Lanahan et al.

rendered by the court below, in accordance with the verdict, from which this appeal is now prosecuted.

In this court, the appellants have assigned, jointly and separately, the following alleged errors:

1st. The court below erred in overruling the motion to dismiss the petition, and set aside the report of the reviewers; and,

2d. The court erred in overruling the motion for a new trial.

There is really no question presented for our consideration, by the record of this cause, or by the alleged errors the appellants have assigned thereon. There was no motion made in or overruled by the court below, to dismiss the petition and set aside the report of the reviewers. If there was, the record wholly fails to disclose it. And it is very certain that there was no bill of exceptions, containing any motion or the action of the court thereon, filed in the court below.

The causes for a new trial, assigned by appellants in their motion for that purpose, were, that the verdict of the jury was not sustained by sufficient evidence, and that such verdict was contrary to law.

There are several reasons, why the decision of the court below, in overruling the appellants' motion for a new trial, ought not to be disturbed by this court. In the first place, it is by no means certain, that the bill of exceptions, set out in the record, contained all the evidence before the court and jury on the trial of this cause. On the contrary, it is evident, we think, from the record, that all the evidence before the jury is not in the bill of exceptions. In the outset of the bill of exceptions, is this statement:

"It was agreed that all papers in the case, proper to be used legally as evidence, be regarded as in evidence."

In our opinion, there were no "papers in the case, proper to be used legally as evidence;" but if the court below thought otherwise, and any of the "papers in the

Emmerson v. Marvel, by her next friend, Marvel.

case" were used as evidence on the trial, and it is fair to presume, from the agreement cited, that some of the papers were so used, it is very certain that the paper or papers, so used, were not set out in, nor in any manner made part of, the said bill of exceptions.

In the second place, it is the law, so well settled by the decisions of this court that it needs no citation of authorities to support it, that where, as in this case, there was evidence adduced on the trial tending to sustain the verdict of the jury, this court will not disturb the decision of the court below, on the mere weight of the evidence.

And in the third place, we have read the evidence on the trial, as the same is set out in the record; and, in our opinion, the preponderance of that evidence fully sustained the verdict of the jury.

We find no error in the record.

The judgment of the court below is affirmed, at the costs of the appellants.

EMMERSON v. MARVEL, BY HER NEXT FRIEND, MARVEL.

SLANDER.—*Words not Actionable Per Se.*—*How made Actionable.*—*Pleading.*

—Words, not actionable *per se*, spoken of the chastity of a woman, may be shown to have been spoken in an actionable sense, by an averment, either, 1st, that they were *intended*, when used, to impute to her a want of chastity, or, 2d, that, in the place where and at the time when used, their common meaning was such as to render them, in that locality, actionable *per se*.

SAME.—That "she was getting fat," and that "some one had slipped up on the blind side of her," spoken of an unmarried woman, are not actionable *per se*.

SAME.—*Colloquium.*—Words, not actionable *per se*, and, to render them actionable, requiring the use of a colloquium and innuendo, are thereby sufficiently shown to have been used in the hearing of another.

SAME.—Words not actionable *per se*, set out in a complaint for slander

Emmerson v. Marvel, by her next friend, Marvel.

with an averment, that, in the place where and at the time when used, they had an actionable meaning, are, *prima facie*, presumed to have been so intended and understood, without its being so alleged.

SAME.—*Pleading.—Arrest of Judgment.—Venue.*—Where, in an action for slander, for the speaking of words not actionable *per se*, the complaint contains a sufficient colloquium and innuendo, and the necessary averment, that, at the place where and the time when spoken, they had a provincial, actionable meaning, but does not name such place, such omission does not render it bad on motion in arrest of judgment.

SAME.—*Words Actionable Per Se.—Evidence.*—That words, actionable *per se*, were spoken in the hearing of a third person need not be alleged in the complaint, but must be proved on the trial, in an action for slander.

SAME.—*Constitutional Law.—Title of Act.*—The statute of this state, authorizing an action for slander for words charging a woman with whoredom, is not unconstitutional for want of a proper title.

From the Gibson Circuit Court.

D. F. Embree, for appellant.

C. A. Buskirk and *W. H. Trippet*, for appellee.

PERKINS, J.—Complaint for slander. Answer, general denial. Trial. Verdict for the plaintiff, for three hundred and fifty-four dollars. Motion in arrest of judgment, overruled. Exceptions, and judgment on the verdict. No bill of exceptions. The motion in arrest is substantially as follows:

1st. The complaint does not state facts sufficient to constitute a cause of action;

2d. It does not show a speaking of the words within the State of Indiana;

3d. It does not show the speaking of the words within the presence or hearing of any person;

4th. It does not allege that the words spoken were ever published; and,

5th. It does not allege the speaking of the words in the presence or hearing of any person having knowledge of their alleged provincial meaning, or that they were spoken by the defendant in their alleged provincial sense.

The case is brought to this court upon the alleged error in overruling the motion in arrest of judgment, and

Emmerson v. Marvel, by her next friend, Marvel.

presents the single question, is the complaint in the cause good on such motion?

It will be proper to set forth the complaint in this opinion. It is as follows:

“Abigail Marvel, plaintiff, an infant, by her next friend, Wesley Marvel, whose written consent thereto is herewith filed, complains of Josephus Emmerson, defendant, and says that she, the plaintiff, Abigail, is an unmarried female, and is and always has been a person of good character, and honest and chaste in all her deportment, and, until the committing of the grievances by the defendant, hereinafter set forth, the plaintiff had never been suspected of the crime of fornication, or any other disgraceful, lascivious or unchaste act; yet the defendant, well knowing the premises, but maliciously intending to ruin the plaintiff's fair name and reputation, and bring her into public infamy, disgrace and scandal, on the — day of September, 1872, spoke of and concerning the plaintiff the following false, defamatory and slanderous words: that is to say; ‘She’ [the plaintiff, Abigail, meaning] ‘was getting fat; some one had slipped up on the blind side of her,’ [the plaintiff meaning] and meaning then and thereby, and by the use of said words, to charge the plaintiff with fornication, and with being pregnant with a bastard child. And again: ‘She’ [the plaintiff, Abigail, meaning] ‘was getting fat,’ (meaning that the plaintiff had been guilty of fornication, and that she was then pregnant with a bastard child); ‘some one had slipped up on the blind side of her,’ [the plaintiff meaning, and meaning that some man had had illicit, carnal intercourse with the plaintiff]. And plaintiff avers that the defendant intended, by the use of said words, to charge the plaintiff with fornication, whoredom, and with having had carnal intercourse with some man, and that she was, at the time of the uttering of said words, pregnant with a bastard child. And said plaintiff avers that said words, when taken together, at the time and place where said words were used by the defendant, had a

Emmerson v. Marvel, by her next friend, Marvel.

provincial meaning, viz., that the female of whom they should be spoken had been guilty of fornication, and was pregnant with a bastard child. Wherefore," etc.

We may observe, at this point, that it is not generally necessary to the sufficiency of a complaint for slander that it should aver a speaking of the words within the State in which the suit is brought. The action for slander is transitory. *Offutt v. Earlywine*, 4 Blackf. 460; *Linville v. Earlywine*, 4 Blackf. 469.

In considering as to the sufficiency of the complaint, the first question decided may properly be, are the words alleged to have been spoken by the defendant, of the plaintiff, viz., "She was getting fat; some one had slipped up on the blind side of her," actionable *per se*? For if they are, the complaint is sufficient, notwithstanding its failure to show that the words were spoken in the presence and hearing of a third person. *Shinloub v. Ammerman*, 7 Ind. 347; *Guard v. Risk*, 11 Ind. 156.

We do not think the words actionable *per se*, throughout the country generally.

This being so, the next question is, does the complaint show, by the requisite allegations, that the words were spoken in an actionable sense, in this particular case.

This might be shown in one or both of two modes.

1st. By allegations in the complaint making it appear that, in this particular instance, they were used in an actionable sense, in a part of the State where they were not actionable *per se*. The words are of that character that renders them capable of being used with an actionable meaning. *Waugh v. Waugh*, 47 Ind. 580.

2d. By averments in the complaint, that, in the locality where they were used, the actionable meaning had become the common meaning, so that, in that locality, the words were actionable *per se*.

The complaint consists of a single paragraph, and it does not contain the necessary requisites to show an actionable speaking, according to the first mode men-

Emmerson v. Marvel, by her next friend, Marvel.

tioned. The colloquium is absent. *Schurick v. Kollman*, 50 Ind. 336. Where an inducement or colloquium and innuendo were required by the common law in a declaration, they are required under the code in a complaint, so far as relates to the subject-matter. See note to *Harper v. Delp*, 3 Ind., on page 234. It is not necessary that we should, in this opinion, particularize as to when a part or all of these special allegations should appear in the complaint. The subject is familiar to the lawyer. The text-books on pleading and practice treat of it minutely. Our own reports abound with cases illustrating it. An early case is *Linville v. Earlywine*, *supra*. Late cases are *Lipprant v. Lipprant*, 52 Ind. 273, and *Spahr v. Nicklaus*, 51 Ind. 221.

As the point in regard to publication of the slanderous words is made on the motion in arrest, we may observe that where the words charged in the complaint are actionable *per se*, it is not necessary to its sufficiency, as has been shown above, that it should contain an allegation that the words were spoken in the presence of some third person, though such fact would have to be proved on the trial; yet where the words are not actionable *per se*, and a colloquium, etc., is required to appear in the complaint, such colloquium will necessarily disclose the fact of the publication of the words to third persons.

We proceed to the second mode mentioned of showing the actionable character of the charge, viz., by averring a provincial, that is, an actionable local meaning in the place where spoken. Are the averments in the complaint sufficient for this purpose? We bring together the parts of the complaint bearing on this point, thus: The defendant, on the — day of September, 1872, spoke of the plaintiff the following defamatory words: “‘She was getting fat; some one had slipped up on the blind side of her;’ and the plaintiff avers that said words, when taken together, at the time and place where said words were

Emmerson v. Marvel, by her next friend, Marvel.

used by the defendant, had a provincial meaning, to wit, that the female of whom they should be spoken had been guilty of fornication, and was pregnant with a bastard child."

The complaint was filed in the Gibson circuit court, Gibson county, Indiana.

We think the complaint sufficient on motion in arrest. In *Miles v. Vanhorn*, 17 Ind, 245, a point decided is thus stated in the syllabus.

"The word 'screwed' does not of itself import sexual intercourse, but it may, in certain localities, be used to impute the charge of whoredom, and where that is the case, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used."

In the opinion, DAVISON, J., says:

"The appellee refers to *Rodebaugh v. Hollingsworth*, 6 Ind. 339; but that authority does not favor his view of the question; because, there the word 'screwed' was alleged in the complaint to have a provincial meaning; and that, at the time when, and place where, it was spoken, it meant sexual intercourse."

In *Lipprant v. Lipprant*, 52 Ind. 273, the complaint went further, and averred that the defendant spoke the words in the provincial sense, and that they were so understood, etc., but the court, in deciding the case, attached no importance to these allegations in the complaint. The court says:

"It seems to us that this paragraph of the complaint is sufficient. To charge a person with keeping a whorehouse is actionable. Townshend Slander, 237. That is what the words import, according to their provincial meaning." See Townshend, *supra*, pp. 170-172, notes.

Prima facie, words having a provincial meaning will be used and understood in the province, the locality, with such meaning, and if that meaning be an actionable one, the words, in the province, will be, *per se*, actionable.

Marsh v. Low

We think the complaint good, probably on demurrer, certainly on motion in arrest. *Shimer v. Bronnenburg*, 18 Ind. 363, fully sustains this conclusion. So does *Thomas v. Hunter*, 44 Ind. 477. Had a motion been made, before answer, requiring the complaint to have specified the place where the words were spoken, it should have been sustained.

The point is made in argument, that an action of slander will not lie at common law for charging a female with whoredom, and that the statute of this State authorizing such action is unconstitutional and void, because not enacted under a proper title. The statute has been too often judicially recognized as valid to be questioned now. *Rodebaugh v. Hollingsworth*, *supra*; *Rodgers v. Lacey*, 23 Ind. 507; and other cases, too numerous to be cited.

The judgment is affirmed, with five per cent. damages, and costs.

Petition for a rehearing overruled.

MARSH v. LOW.

PROMISSORY NOTE.—Draft.—Acceptance.—Principal and Surety.—By the acceptance of a draft drawn upon him, the acceptor becomes, not merely a surety for the drawer, but a principal debtor.

SAME.—Accommodation Acceptance.—Action Upon.—Defence.—In a suit upon an acceptance, it is no defence that the acceptor executed the same, without receiving any consideration therefor, merely for the accommodation of the drawer, to whom the acceptor was not then, and has not since been, indebted, and for whom he has never held any funds subject to draft.

SAME.—Warranty by Drawee to Drawer.—Breach of.—Where the consideration of a draft, as between the drawee and drawer, was the unconditional, *bona fide* sale of an article of personal property, by the former, to the latter, accompanied by a warranty, a breach thereof can not be set up by the acceptor, as a defence to an action against him, upon his acceptance of such draft.

Marsh v. Low.

SAME.—Sale.—Rescission.—Remedy.—Recoupment.—A breach of a warranty of personal property which was unconditionally sold, in the absence of fraud, gives to the purchaser no right to rescind the contract, but an action upon such warranty, either by way of an original action, or by recoupment.

QUERY.—Can an accommodation acceptor, in an action upon his acceptance, set up a failure or want of consideration between the drawer and drawee?

From the Laporte Circuit Court.

A. L. Osborn, W. H. Calkins and F. G. Johnson, for appellant.

J. A. Thornton and J. H. Orr, for appellee.

WORDEN, C. J.—Action by the appellee, against the appellant, upon the acceptance by the latter of the following instrument, viz.:

“GEORGE MARSH, ESQ.; \$150.

“Please pay Daniel Low, or order, one hundred and fifty dollars. D. C. BOWEN & Co.”

“November 15th, 1874.”

Endorsed. “Accepted by GEORGE MARSH.”
Judgment for the plaintiff.

Two errors are assigned:

1st. That the complaint does not state facts sufficient to constitute a cause of action; and,

2d. That the court erred in sustaining a demurrer to the amended answer of the appellant.

The objection to the complaint is, that it did not contain the copy of the instrument sued on; but this defect in the record has been supplied by a return to a *certiorari*.

The amended answer, to which a demurrer was sustained, was as follows:

“And for a further and second answer, the defendant, Marsh, says, that the sole and only consideration for the order in suit was the sale, by the plaintiff, to the drawers of the note, of a certain horse; that the defendant accepted said order as an accommodation acceptor for said drawers, and not otherwise; that said order was not

Marsh v. Low.

drawn against any funds, and that he had no funds on hand at the date of the acceptance, nor has he since that time had, nor has he now, any funds on hand belonging to said drawers; all of which the said plaintiff then and there well knew, and that there was no other and different consideration between the plaintiff and defendant, and between the defendant and the drawers of said bill. That said order was given by said drawers, to said plaintiff, for a horse sold by said plaintiff, to said drawers; that the plaintiff, at and before the sale, and at and before the drawing of said order, and as an inducement to said drawers to purchase said horse, then and there warranted said horse to be perfectly sound in every particular. And the said defendant avers that said horse was not then and there sound, but, on the contrary, was sick and diseased, in this, that he then and there had inflammation of the stomach, and for a long time had been so sick and diseased, to wit, for six months then immediately preceding; that inasmuch as he was then and there so sick and diseased as aforesaid, he was entirely worthless; that such disease was of such a nature that said Bowen did not and could not discover the same until after he began to use said horse. That immediately after the purchase aforesaid the drawers commenced using said horse, and that immediately thereafter the said horse died solely of the disease aforesaid, and thereupon the drawers of said bill notified the defendant, Marsh, not to pay it, which he accordingly refused."

The appellant, Marsh, by accepting the bill, although it was accepted by him for the accommodation of the drawers, became a principal debtor, and not a surety for the drawers. And he is bound by his acceptance, whether he had funds in his hands, of the drawers', with which to pay the bill, or not. *Lambert v. Sandford*, 2 Blackf. 137; *Murray v. Judah*, 6 Cow. 484-492; *Grant v. Ellicott*, 7 Wend. 227; *Farmers and Mechanics' Bank v. Rathbone*,

Marsh v. Low.

26 Vt. 19; *Cronise v. Kellogg*, 20 Ill. 11; *Diversy v. Moor*, 22 Ill. 330.

As Marsh, by his acceptance of the bill, became a principal debtor, and, as such, liable on his acceptance, we do not see that it would be competent for him to raise any question as to the want or failure of consideration, as between the drawers and the payee. But without deciding this question, we proceed to enquire whether the answer sets up either a want or failure of consideration.

The horse, it would seem from the answer, was unconditionally sold by the payee of the bill, to the drawers, and there is no fraud averred in the sale or the warranty.

We think it established by the weight of authority, that where property has been unconditionally sold, with a warranty superadded, in the absence of fraud the purchaser can not, because of a breach of the warranty, without the consent of the seller, rescind the contract and recover back the purchase-money paid, as for money paid upon a consideration which has failed, or defend against the collection of the purchase-money upon the ground of want or failure of consideration. The remedy of the purchaser in such case is an action for a breach of the warranty; and the remedy may, doubtless, be enforced in a proper case, by way of recoupment or counter-claim. See 2 Addison Cont., p. 233, par. 632; *Thornton v. Wynn*, 12 Wheat. 183; *West v. Cutting*, 19 Vt. 536; *Kase v. John*, 10 Watts, 107; *Allen v. Anderson*, 3 Humph. 581; *Lightburn v. Cooper*, 1 Dana, 273; *Voorhees v. Earl*, 2 Hill, (N. Y.) 288; *Cary v. Gruman*, 4 Hill, (N. Y.) 625.

The defence set up in the answer is neither a want or a failure of consideration. It shows a right to damages for a breach of the warranty of the soundness of the horse. But those damages were not due to the defendant, but to the purchasers of the horse, the drawers of the bill. Doubtless, if the drawers of the bill had been sued upon it, they might have set up the breach of the warranty, by way of counter-claim. But the defendant was not enti-

Darnall *et al.* v. Hurt, Guardian.

tled to the damages arising from the breach of the plaintiff's warranty, and he could not set them up in this action, by way of counter-claim or otherwise.

For these reasons, we are of opinion that the court committed no error in sustaining the demurrer to the answer.

The judgment below is affirmed, with costs.

DARNALL ET AL. v. HURT, GUARDIAN.

SUPREME COURT.—*Practice.—Assignment of Errors.—Names of Parties.*—The assignment of errors on appeal to the Supreme Court must contain the full names of all the parties to the appeal, or it will be dismissed.

55	275
139	500

From the Boone Circuit Court.

J. H. Goodwin, for appellants.

R. C. Gregory, W. B. Gregory and *R. W. Harrison*, for appellee.

NIBLACK, J.—It is provided by rule No. 1 of this court, that "The assignment of error shall contain the full names of the parties." The appellants in this case have not complied with that rule. The names of William Emmert and Gilbert H. Goodwin, two of the defendants in the court below, and on whose motion the appeal to this court was granted, and in whose especial interests it seems to be prosecuted here, do not appear at all in the assignment of error, on the record in this cause. For that reason, the appellee moves to dismiss the appeal, and the motion will have to be sustained.

The appeal is dismissed, at the costs of the appellants.

Hottell v. Adamson et al.

HOTTELL v. ADAMSON ET AL.

SUPREME COURT.—Practice.—Bill of Exceptions.—Record.—Where no bill of exceptions is in the record on appeal, and no special finding of facts was made by the court, the Supreme Court can not review the action of the circuit court upon a motion for a new trial, based upon the ground that the finding of such court was contrary to law or unsustained by the evidence.

SAME.—Assignment of Errors.—Record.—Where, on such appeal, the rulings of the circuit court, complained of in the assignment of errors, do not appear in the record, no question is presented for decision.

From the Harrison Circuit Court.

G. W. Denbo and W. N. Tracewell, for appellant.

A. Stephens, for appellees.

PERKINS, J.—Petition for a highway. Conrad F. Hottell remonstrated. The highway was not established by the board of commissioners. The petitioners appealed to the circuit court, where, on a trial of the cause by the court, the road was established. The record does not contain the evidence, nor any special finding by the court. There is no bill of exceptions in the record.

The following is appellant's assignment of errors, in this court:

1st. The court erred in overruling appellant's motion for a new trial;

2d. In overruling appellant's motion to dismiss the action of the appellees for the insufficiency of the petition, it not definitely describing the route of the proposed highway;

3d. Same as the second;

4th. In overruling appellant's motion to dismiss on the ground that the petition seeks, in the same proceeding, to locate, change and vacate a highway, in the same petition; and,

5th. In overruling the motion to dismiss on the ground that petitioners seek to locate a highway upon and along a highway already established and used as such.

Pate v. Roberts.

The reasons assigned in the motion for a new trial were :

1st. The finding of the court is contrary to law ; and,

2d. The finding of the court is not sustained by the evidence.

As there is no bill of exceptions in the record, this court can not say the alleged errors exist. As to the new trial, in the absence of a bill of exceptions containing the evidence or some erroneous ruling in the progress of the cause, we can not say the court erred.

As to the second, third, fourth and fifth assignments of error, the record does not show that any such motions, as are therein assumed to have been made, were made. No motion in writing appears in the record, except the motion for a new trial.

The judgment below is affirmed, with costs.

PATE v. ROBERTS.

COSTS.—Excessive Damages.—Remittitur.—Supreme Court.—Practice.—Where, on appeal to the Supreme Court, it appears from the evidence that a portion of the damages assessed against the appellant is excessive, and the remainder just, upon a remittitur by the appellee of such excessive portion, the remainder, with the costs accrued before the appeal, will be affirmed, but the costs of the appeal will be adjudged against the appellee.

From the Dearborn Circuit Court.

N. S. Givan and *W. H. Matthews*, for appellant.

O. B. Liddell, for appellee.

WORDEN, C. J.—This was an action by the appellee, against the appellant, on an account. Trial by the court, resulting in a finding and judgment for the plaintiff, for one hundred and one dollars.

Vawter v. Gilliland et al.

The defendant moved for a new trial, on the ground, amongst other things, that the damages assessed were excessive.

We are of opinion, upon an examination of the evidence, that the amount of the recovery was too large, and not supported by the evidence.

But the administrator of the appellee, who has departed this life since the submission of the cause, has filed a remittitur of all of said sum so recovered, except sixty dollars, and we are of opinion, from the evidence, that the judgment below for the residue, viz., sixty dollars and costs, ought to be affirmed. But this will have to be done at the costs of the appellee, accruing in this court.

The judgment below, for sixty dollars and costs, is affirmed, at the costs, in this court, of the appellee.

VAWTER v. GILLILAND ET AL.

HIGHWAY.—*Petition.*—*Names.*—*Initials.*—*Partnership Names.*—*Arrest of Judgment.*—Where the petition for the location of a highway, in alleging the names of the owners of lands which will be affected by the construction thereof, only sets out the initials of the Christian name, or the partnership name, only, of any of such owners, it is fatally defective on motion in arrest of judgment.

SAME.—*Report of Viewers.*—Upon appeal of such proceeding to the circuit court, the report of the viewers appointed by the county board can not be called in question.

SUPREME COURT.—*Practice.*—*New Trial.*—*Record.*—Where the truth of the grounds of a motion for a new trial is not made manifest by the record on appeal, no question as to the ruling on such motion is presented to the Supreme Court.

NEW TRIAL.—*Cause for.*—An erroneous ruling upon a motion made prior to the trial of a cause is not ground for a new trial.

From the Ripley Circuit Court.

W. D. Ward, G. Durbin and H. W. Harrington, for appellant.

55	278
126	312
55	278
140	370
140	437
141	558

55	278
149	689

55	278
0170	117

Vawter v. Gilliland et al.

PERKINS, J.—The following petition to the board of commissioners of Ripley county was duly filed:

“To the Honorable Board of Commissioners of Ripley county, Indiana:

“Your petitioners, citizens of Shelby township, in said county, respectfully ask your honorable board to locate and establish a public highway in said township, described as follows, to wit: Commencing about twenty rods north of the center of section five, township six, range eleven, east, at the mouth of a road running from Big Graham Creek, south, to a road known as the Vevay and New Marion Road; thence south, on the half section line of sections five, eight and seventeen, same township and range aforesaid, until it strikes the old plank road, running from Versailles to Madison, where the said half section line crosses said plank road, in section seventeen, as aforesaid, and about thirty rods south of the center of section seventeen, as aforesaid; said road will be about two miles and fifty rods in length, and will run over or along the lands of the following named persons, viz.: William Curran, Fred. Wilber, George Rine, W. D. and T. E. Willson, W. D. Willson, Jones & Rine, John Peterman, T. S. Vawter & Co., James I. McCarty and James O. Campbell, (land formerly of Cardius Royce's heirs), and we, as in duty bound, will ever pray.

Signed, “P. S. Jolly, John Miles, Elizabeth Miles, Edwin Flint, James I. McCarty, Wm. F. Gilliland, William Walton, Susan Flint, James C. Myers, Wm. Hyatt, Nathaniel Hostettler, E. C. Mayhew, John T. Ford, William Curran, John S. Christie, Jane Thompson.”

Viewers were appointed.

They reported that they “did view and mark out said route, and we, the viewers, report said road favorable, and of public utility.”

The board located the road as petitioned for, and ordered it opened thirty-three feet wide.

Vawter v. Gilliland *et al.*

Milton S. Vawter appealed to the circuit court. In that court, he filed this motion :

“Comes Milton S. Vawter, the appellant, and moves the court to dismiss the petition in this case, because,

“1st. It does not sufficiently fix the beginning and terminus of the proposed highway ;

“2d. The viewers had no authority to act ;

“3d. The report of the viewers is a nullity, in this, that it does not locate the road so that each adjoining owner should give half the road ;

“4th. The petition does not state facts sufficient to give the commissioners jurisdiction of the matter, as it does not appear that any of the signers to the petition for the proposed highway resided in the immediate neighborhood of it.”

The court overruled the motion, and the appellant excepted.

Appellant then filed this motion :

“Comes Milton S. Vawter and moves the court to set aside the report of the viewers herein, for the following reasons, viz.:

“1st. Because, by their report, they do not lay out and mark the proposed highway ;

“2d. Because the viewers have not laid out said highway, so that each adjoining owner should give half the road ;

“3d. Because said report does not give a full description of the location of said road, but simply reports that a road, such as the petition asks for, is of public utility.”

The motion was overruled, and exception noted.

A bill of exceptions shows the action of the court upon these motions.

The cause was then tried by a jury, and the following verdict found :

“We, the jury, find that the proposed road would be of public utility.”

Vawter v. Gilliland *et al.*

Appellant interposed the following motion for a new trial :

1st. Because the verdict is not sustained by the evidence ;

2d. Because the court permitted the jury to take the original petition in the case, and the report of the viewers, with them to the jury room, while deliberating upon their verdict ;

3d. Because the court overruled the motion to dismiss the petition ; and,

4th. Because the court overruled the motion to set aside the report of the viewers.

The court overruled the motion, and appellant excepted. A motion in arrest was also overruled, and judgment laying out the road entered. Appeal to this court, and an assignment made that the court below erred in overruling the appellant's motions, to dismiss, to set aside report of viewers, for a new trial, in arrest of judgment, and that the court erred in rendering its final judgment.

The ruling upon the motion to set aside the report of the viewers was upon an immaterial matter. It had nothing to do with the trial in the circuit court.

The overruling of the motion to dismiss presents the question whether the petition was sufficient to enable the court to make a legal location upon it, of the highway.

It is claimed that it is fatally defective, on account of its failure to set out the full given names of the owners of the land ; that giving the initials only of the Christian names of individual owners, and the firm names only of owners in partnership, is not a compliance with the statute. *Hughes v. Sellers*, 34 Ind. 337, is cited to the point. We think this objection is well taken, and that the petition is fatally defective, on motion in arrest.

There is nothing in the record upon which this court can say the court erred in overruling the motion for a new trial. We can not say the verdict was not sustained by

Posey v. Scales et al.

the evidence; because, while it is admitted that evidence was given on the trial, the record does not contain it; and errors occurring during the trial are not shown. Hence, we are not called upon to express an opinion, upon the legality, or otherwise, of permitting the jury to take to their consultation room the petition and report, mentioned in the motion for a new trial; because we have no evidence that such permission was given, or that those papers were, in fact, taken by the jury. Appellant, in his motion for a new trial, intimates that such were the facts; but the court overruled his motion, for aught we know, because the facts assumed in it were not realities. The court, under its signature, does not appear to have admitted their existence, anywhere in the record. As to the remaining grounds on which the new trial was asked, they were not such as entitled the party to it. They do not go to the regularity of the trial had.

The judgment is reversed, with costs. Remanded, with instructions to dismiss petition.

POSEY v. SCALES ET AL.

CONTRACT.—Construction.—Option.—Notice.—Pleading.—By the terms of a written contract, one party thereto bound himself to deliver to the other a specified amount of a certain kind of chattels, at a place therein designated, “at the option of the” latter “at any time” during a specified period. *Held*, in a suit by the former, against the latter, for a breach of such contract, that it was the duty of the latter to have notified the former as to what time during such period such delivery should be made.

Held, also, that it was sufficient for the former to aver in his complaint, that, during all of such period, he had had the amount and kind of chattels agreed upon in his possession, ready for delivery, but that, though the latter had notice thereof, he never notified the former to deliver the same, whereupon, after the expiration of such period, he sold the same to a third person, to his damage.

Posey v. Scales et al.

BILL OF EXCEPTIONS.—Record.—Supreme Court.—Practice.—Unless, upon appeal to the Supreme Court, the record shows that the bill of exceptions was filed in time, it constitutes no part of the record.

From the Pike Circuit Court.

C. M. Allen, F. B. Posey, J. C. Denny and C. S. Denny,
for appellant.

W. H. De Wolf and G. G. Reily, for appellees.

NIBLACK, J.—This action was brought by Francis V. Scales, James Case and Thomas Case, against William H. Posey, Hannibal Orr, DeWitt C. Kemper and Levi Ferguson.

The complaint was in two paragraphs.

The first paragraph averred, that, on the 2d day of March, 1873, the said Scales and Ferguson entered into a contract, in writing, with the said Kemper, Orr and Posey, by which it was agreed that the said Scales and Ferguson would thereafter, at any time in the months of August or September, 1873, to be designated by the said Kemper, Orr and Posey, deliver to them five hundred smooth, merchantable, fat, corn and grass fed hogs, none of which should weigh less than two hundred pounds, gross weight, on the scales, at the city of Washington, in the State of Indiana, for which the said Kemper, Orr and Posey, on their part, agreed to pay the said Scales and Ferguson, upon delivery at said city of Washington, five cents per pound, gross weight.

That it was also stipulated, in said contract, that if either party failed to perform the obligation thereof, the party failing so to do should pay to the other five hundred dollars, as and for the damages sustained by reason of such non-performance.

That some time in July, 1873, the said Levi Ferguson sold and transferred his interest in said contract to the said James Case and Thomas Case.

That, soon after the said Case and Case became thus interested in said contract, they and the said Scales, at great

Posey v. Scales et al.

labor and expense, purchased and collected together the number and kind of hogs described in said contract, to wit, five hundred smooth, merchantable, fat, corn and grass fed hogs, none, during said months of August and September, 1873, weighing less than two hundred pounds, and held and kept the same at Pike county, in said State, during said months of August and September, ready to be delivered at the scales, at said city of Washington, at any time during said months at which the said Kemper, Orr and Posey might have notified them, said Scales, Case and Case, that they, said Kemper, Orr and Posey, would receive said hogs, of all which the said Kemper, Orr and Posey were duly notified.

That the said Kemper, Orr and Posey wholly failed to designate any day when they would receive said hogs, and wholly failed to receive or accept said hogs, or any part thereof.

That, some time in October, 1873, the said Scales, Case and Case, having ascertained that the said Kemper, Orr and Posey would not accept said hogs, sold the same to other persons at great loss, to wit, at a loss of the sum of two hundred dollars, and that the said Kemper, Orr and Posey had not paid the sum of five hundred dollars, as damages for their failure to comply with said contract on their part.

The second paragraph was very similar to the first, in its averments, except that it was not averred in it that the hogs were held and kept "in Pike county," ready to be delivered when requested, and that it did contain an averment that the said Kemper, Orr and Posey were to give notice to the said Scales, Case and Case when they were ready to receive said hogs.

A copy of the contract referred to was filed with the complaint, and, after reformation by the court, is as follows:

"This agreement witnesseth, that D. C. Kemper, Hannibal Orr and W. H. Posey, parties of the first part, and

Posey v. Scales et al.

F. V. Scales and Levi Ferguson, parties of the second part, have made the following contract, viz.: That the said parties of the second part agree to furnish to the said parties of the first part, five hundred smooth, merchantable, fat, corn and grass fed hogs, none to weigh less than two hundred pounds, gross weight, on the scales, at Washington, Indiana, at the option of the parties of the first part, at any time in the months of August or September, 1873, and that the parties of the first part agree to pay to the parties of the second part, upon delivery, five cents per pound for said hogs.

"Both parties agree that the party failing to comply with the terms of this contract shall pay to the other party the sum of five hundred dollars.

"D. C. KEMPER,

"H. ORR,

"W. H. POSEY,

"LEVI FERGUSON,

"F. V. SCALES."

Levi Ferguson was made a defendant to answer as to his interest, if any, in said contract, and made no defence.

There was no service of process on Kemper.

Orr and Posey filed a demurrer to the complaint, demurring to each paragraph separately, for want of sufficient facts to constitute a cause of action.

The court held both paragraphs sufficient on demurrer, to which the said Orr and Posey excepted.

The said Orr and Posey then answered in two paragraphs.

The first was the general denial.

The second alleged, that, from and after the 30th day of September, 1873, the said Scales, Case and Case continued in possession of the hogs named in the complaint, exercised acts of ownership over them, and sold said hogs without the knowledge or consent of the said Kemper, Orr and Posey, and without notice to them of an inten-

Posey v. Scales *et al.*

tion to do so, and without notice to them, said Kemper, Orr and Posey, that they should comply with the contract set out in the complaint.

A demurrer was filed and sustained to this second paragraph of the answer, to which the said Orr and Posey also excepted.

The cause was then tried by a jury, and there was a judgment for the plaintiffs, against the said Orr and Posey.

Posey appeals to this court, and makes Orr one of the appellees.

A paper was copied into the record, purporting to be a bill of exceptions, but there is no evidence accompanying it to show that it was filed in time, or, indeed, that it was ever filed, and, hence, we cannot consider it a part of the record. *Fulkerson v. Armstrong*, 39 Ind. 472; *The City of Terre Haute v. Ripley*, 43 Ind. 508; *Rinehart v. Bowen*, 44 Ind. 353. The evidence, therefore, is not in the record, and the only questions presented to us here arise out of the rulings of the court, overruling the demurrer to the complaint, and sustaining the demurrer to the second paragraph of the answer.

The only objection urged to the complaint is, that both paragraphs fail to aver a tender of the hogs, at the scales, at Washington, during the months of August and September, 1873, or at any other time. It is insisted that such a tender was necessary, to put the said Kemper, Orr and Posey in default, under the contract. We do not so construe the terms of the contract. These persons, known as the parties of the first part in the contract, clearly reserved to themselves the option of indicating at what time, during certain months, the hogs should be delivered to them, and we think it follows that the duty devolved on them of notifying the other parties to the contract when they would receive the hogs. It was, consequently, in our opinion, sufficient for the parties of the second part to aver that they had the kind and quantity of hogs

Tritlipo v. Lacy.

called for by the contract, ready to be delivered at any time when demanded, during the months of August and September, 1878, of which the parties of the first part had notice. *West v. Emmons*, 5 Johns. 179.

The appellant, in his brief, does not urge the sufficiency of the second paragraph of the answer. The facts averred in it afforded no excuse to the said Kemper, Orr and Posey for their alleged default in naming a time for the delivery of the hogs in question, during the months through which their option extended. In our judgment, it was insufficient as a defence to the action.

We have, therefore, come to the conclusion that the court did not err, either in overruling the demurrer to the complaint or in sustaining the demurrer to the second paragraph of the answer.

The judgment is affirmed, with costs.

55	287
165	390

TRITLIPO v. LACY.

WARRANTY.—Breach.—Measure of Damages.—Instruction to Jury.—Where, in an action to recover the contract price of a chattel, the defence is a counter-claim for damages for a breach of a warranty of soundness of such chattel, alleged to have been made by the plaintiff on the sale thereof, the court instructed the jury trying the case, that the measure of damages to be allowed for such breach, was the difference between such contract price and the actual value of such chattel at the time of sale, to which might be added “necessary expenses in finding and caring for such chattel during its unfitness for use caused by the unsoundness complained of.”

Held, that such instruction is erroneous throughout.

INTERROGATORIES TO JURY.—Verdict.—Supreme Court.—Practice.—The question as to whether judgment should have been rendered upon answers of a jury to interrogatories, notwithstanding and contrary to their general verdict, can not be raised for the first time in the Supreme Court.

NEW TRIAL.—Cause.—Interrogatories to Jury.—That the answers of a jury to interrogatories are inconsistent with their general verdict is not ground for a new trial.

Tritlipo v. Lacy.

From the Hamilton Circuit Court.

D. Moss, for appellant.

J. W. Evans and *R. R. Stephenson*, for appellee.

BIDDLE, J.—Complaint on a promissory note. The defence set up against it is, that it was given for a horse which was warranted to be sound and was not sound. We do not state the pleadings any more particularly, as the parties have made no point upon them in their briefs. Trial by jury. A general verdict for appellee, who was the defendant below, and answers to certain special interrogatories, among which were the following:

“1. What was the horse, mentioned in the defendant’s answer, actually worth at the date of the trade?”

“Answer. Seventy-five dollars.”

“2. How much do you allow the defendant, if any thing, for keeping the horse in question?”

“Answer. Seventy-eight dollars.”

Over a motion for a new trial, and exceptions reserved, a judgment was rendered for the appellee, on the general verdict.

The causes assigned for a new trial are:

1st. The verdict is not sustained by the evidence; and,

2d. Error, in giving certain instructions to the jury, which were asked for by the appellee. One of the instructions complained of was given in the following words:

“3. If the defendant purchased the horse under a warranty from the plaintiff that he was sound, the plaintiff is bound on his warranty for all damages necessarily and naturally resulting from the breach of the same; the measure of damages in such case being the difference between the actual value of the horse at the time of sale, and the contract price, to which may be added the necessary expenses of the defendant in finding

 Mitchell v. Chambers.

and caring for said horse, during his unfitness for use, caused by the unsoundness complained of.”

The above instruction is erroneous throughout. *Street v. Chapman*, 29 Ind. 142; *Booher v. Goldsborough*, 44 Ind. 490; *The Pittsburgh, etc., R. W. Co. v. Heck*, 50 Ind. 303.

It is apparent, from the answer by the jury to special interrogatory number two, that this instruction injured the appellant, and, according to the answer to special interrogatory number one, the general verdict should have been for seventy-five dollars, in favor of the appellant; for the jury had no right to deduct the subsequent expense of keeping the horse, from his value at the time of the sale. Perhaps the judgment should have been for the appellant, on the special findings, for seventy-five dollars, notwithstanding the general verdict; but no such motion was made below, and the appellant can not raise the question, here, for the first time. The inconsistency of special findings with the general verdict is not a cause for a new trial, nor was it presented in this case in any way which will authorize us to consider the question. *Adamson v. Rose*, 30 Ind. 380; *Brannon v. May*, 42 Ind. 92; *Shanks v. Albert*, 47 Ind. 461.

But, for the error contained in instruction number three, the judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings

 MITCHELL v. CHAMBERS.

NEW TRIAL.—*Cause for.*—*Evidence Excluded.*—*Practice.*—Where the evidence intended to be elicited by a question put to a witness, but excluded on objection, is not made known to the court, at the time such objection is made, such exclusion is not a sufficient cause for a new trial.

SAME.—*Surprise.*—*Affidavit.*—*Supreme Court.*—*Practice.*—Where “surprise”

VOL. LV.—19

Mitchell v. Chambers.

at evidence given upon the trial of a cause is relied upon as ground for a new trial, if the affidavit which must be made in support thereof be met by counter affidavits, the decision of the court upon the question of fact, thereby presented will not be reversed by the Supreme Court, on appeal, on the mere weight of such evidence.

SUPREME COURT.—*Practice.*—*Weight of Evidence.*—Where the evidence given on the trial of a cause tends to support the finding therein, the Supreme Court, on appeal, will not disturb such finding on the mere weight of evidence.

From the Cass Circuit Court.

S. T. McConnell and J. C. Nelson, for appellant.

M. Winfield, for appellee.

Howk, J.—In this action, the appellee, as plaintiff, sued the appellant, as defendant, in the Carroll circuit court; but before the final trial of the cause, the venue thereof was changed from the latter court, to the court below.

In his complaint, the appellee alleged, in substance, that on or about the 15th day of April, 1867, the appellee purchased of the appellant the real estate in Carroll county, Indiana, particularly described in said complaint, for the agreed price of twenty-seven hundred dollars, of which sum one thousand dollars was to be paid down, one thousand dollars in April, 1869, and the balance in April, 1870; that when he made said purchase, the appellee paid the appellant seven hundred dollars and executed his note to appellant for three hundred dollars, balance of the amount that was to be paid down, and also executed his two notes to appellant for said deferred payments; that on the 25th day of April, 1870, appellee paid the appellant two hundred dollars on said three-hundred-dollar note; that the appellant executed to appellee, at the same time, his bond, obligating himself to convey said real estate to the appellee; that in pursuance of said purchase, appellee entered into possession of said lands, farming the same, and made valuable and lasting improvements thereon, to the value of three hundred dollars; that in the early part of the year 1869, the appellant told, and agreed with, the appellee, that he, the appellant,

Mitchell v. Chambers.

would take the lands back, and appellee should lose nothing, and he would pay the appellee the money, and interest thereon, that appellee had paid on said land, and would pay appellee for said improvements, if appellee would surrender said lands to appellant, without trouble, and he requested the appellee to let him have said bond. And the appellee averred, that, in pursuance of said request, he let the appellant have said bond, and that appellant took the same, and then retained it, and therefore the appellee could not give a copy thereof; and that, in pursuance of appellant's said agreement to pay him said money and interest, and for said improvements, and that appellee should lose nothing,—he surrendered to appellant said lands, without trouble; but the appellant had ever since, and then, refused to pay him said money and the interest thereon, and for said improvements; and the appellee averred, that there was then due him for said money and interest thereon, and for said improvements, the sum of one thousand five hundred dollars, for which he demanded judgment.

The appellant's final answer in this action was in six paragraphs, numbered from third to eighth, both inclusive, the first two paragraphs having been withdrawn. In the amended third paragraph of his answer, the appellant alleged, in substance, that he admitted that at one time he made a contract of sale with the appellee, for the lands described in the complaint, that certain papers were exchanged in pursuance of said contract, and certain payments made, and that appellee entered into possession of said land and enjoyed its use for two years, but he denied that appellee made any valuable or lasting improvements thereon; and the appellant averred, that, on or about the 18th day of March, 1868, appellee agreed with him, that, in consideration of appellant's then surrendering to appellee his notes mentioned in his complaint, and all evidences of debt, held by appellant against appellee, and releasing appellee from all claims for the use of said farm,

Mitchell v. Chambers.

for timber taken therefrom, and for the crops thereof, and would allow appellee to remove the then growing crops on said land,—the appellee would deliver up his title-bond for said land, and, on or before March 23d, 1868, deliver up to appellant the possession of said land; that appellee would then and there release appellant from all claims held by him against the appellant, and would execute to appellant his obligation to deliver up to appellant the possession of said land, according to that agreement,—which obligation was then and there executed to appellant, and a copy thereof was filed with, and made part of, said paragraph of answer; and appellant averred, that the payment mentioned in said obligation never was made by appellee; that appellee gave up possession of said land, as in said obligation agreed; and that the said agreement, then and there made by him with appellee, which was by the appellant in all things faithfully carried out by surrendering to appellee all notes, accounts, claims and obligations held against him, and allowing the appellee, after his surrender of the possession of said land, to reenter upon the same and remove his crop,—was then and there solemnly agreed, by and between him and the appellee, to be an accord and satisfaction of all claims or demands, of any description, either growing out of said contract of sale and occupancy of said land, or of any other transaction whatever. Wherefore appellant said that appellee ought not to recover in this action, and prayed judgment for costs, etc.

The obligation mentioned in this paragraph of answer, and alleged to have been executed by appellee, recited that the appellant had, on April 13th, 1867, contracted and agreed to sell to appellee a certain tract of land in Carroll county, describing the land, and that the appellee had failed to make the payment, which had already become due on the same, and concluded as follows:

“Now, therefore, this agreement witnesseth, that the said Chambers now agrees to quit possession and deliver

Mitchell v. Chambers.

up said premises to said Mitchell, on or before the 23d day of March, 1868, provided the said Chambers does not make the payment already due thereon, to wit, the sum of one thousand one hundred dollars, by that time.

(Signed)

JAMES CHAMBERS.

“March 18th, 1868.

“Witness: A. H. EVANS.”

In the fourth paragraph of his answer, the appellant pleaded the same facts that are pleaded in the third paragraph of his answer, as an accord and satisfaction of appellee's cause of action, except that he did not allege appellee's said agreement to be in writing.

In the fifth paragraph of his answer, the appellant claimed, by way of counter-claim, for the use and occupation of said land, and for timber, etc., cut and removed from said land, and for crops grown on said land, a large sum in damages.

In the sixth paragraph of his answer, the appellant pleaded the same matters, as in the fifth paragraph, by way of set-off.

The seventh paragraph of the answer was a general denial.

The eighth paragraph was a plea of payment.

The appellee demurred separately to the third, fourth fifth and sixth paragraph of appellant's answer, for the want of sufficient facts in each paragraph, to constitute a defence to the action. The record shows that the demurrer to said third paragraph of answer was overruled; but it fails to show any action of the court below, on either of the other demurrers to either of the other paragraphs of answer.

The appellee replied, in three paragraphs, to the appellant's answer, as follows:

- 1st. By a general denial;
- 2d. Payment of appellant's set-off; and,
- 3d. That appellant's claims were wholly without consideration.

Mitchell v. Chambers.

The first paragraph of the reply was sworn to by appellee.

The action being at issue was tried by a jury, in the court below, and a verdict was returned for the appellee, assessing his damages at one thousand one hundred and eleven dollars and ninety-one cents. On written causes filed, the appellant moved the court below for a new trial, which motion was overruled, and appellant excepted, and judgment was rendered upon the verdict.

In this court, the appellant has assigned but one alleged error, namely;

That the court below erred in overruling the appellant's motion for a new trial.

In his motion for such new trial, the appellant assigned several distinct causes therefor; but, in his argument of this cause, the appellant has only urged upon our consideration the following points, all of which are properly presented in and by the record of this cause, and by the alleged error assigned thereon:

1st. The court below erred, in the exclusion of competent and material evidence, offered on the trial by the appellant;

2d. The court below erred, in refusing the appellant a new trial, upon the ground, that, by appellee's evidence, the appellant was taken by surprise, which ordinary prudence could not have guarded against; and,

3d. That the court below should have sustained the appellant's motion for a new trial, upon the weight of the evidence.

These several points we will consider and decide, in the order in which we have mentioned them.

1st. In considering the alleged error of the court below, in excluding from the jury the evidence, which the appellant claims that he offered on the trial, we may remark in the outset, that the record wholly fails to show what the excluded evidence was, or what fact or facts the appellant expected to establish thereby. Certain ques-

Mitchell v. Chambers.

tions were propounded by the appellant to his witnesses, on the trial, which the appellee objected to, and the court below sustained the objection, and the appellant excepted. And this is all that the record shows, either in the bill of exceptions or in the appellant's motion for a new trial, in relation to the alleged excluded evidence. It does not appear that the appellant informed the court below, at any time, what the evidence was which he hoped to elicit by his questions which were not allowed, nor what fact or facts he hoped to prove by the answers to such questions. It will not do to say, in such a case, that the court below could see, from the nature of the questions, what facts the appellant hoped to prove by such questions. Very possibly, the court below might guess correctly, from the questions asked, what fact the party might desire to prove by the answer to such question; but the court is not, and ought not to be, required to guess at such a fact; and then, too, the court might not guess correctly. Where a party may wish to avail himself, in this court, of an alleged error of the court below, in the exclusion of offered evidence, it is due to both the courts, that the record should show, clearly and explicitly, and without any necessity for inference or surmise, what evidence was offered and excluded, and what facts it was intended to establish thereby. Where, as in this case, the record shows only that certain questions were propounded to certain witnesses, and does not show the particular evidence which it was expected would be elicited by the answers to such questions, we can not say from the record that the court below erred in sustaining the objections to such questions. *The Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Lewis v. Lewis*, 30 Ind. 257.

2d. "Accident or surprise, which ordinary prudence could not have guarded against," is the third statutory cause for a new trial. 2 R. S. 1876, p. 180. It is one of the causes, which "must be sustained by affidavit," showing its truth. 2 R. S. 1876, p. 183, sec. 355. In the case at

Mitchell v. Chambers.

bar, the "surprise" alleged by appellant was sustained by affidavit, but it was controverted by other affidavits. Where this is the case, a question of fact is presented, which must be determined by the court below, like any other question of fact in a civil action, upon the weight of the evidence. And the decision of the court below, upon such a question, will not be disturbed by this court, upon the mere weight of the evidence. We have examined the affidavits and counter-affidavits, in relation to the alleged "surprise," and, in our opinion, the decision of the court below, in overruling the appellant's motion for a new trial, in so far as it involved the appellant's alleged "surprise" as a cause for such new trial, was right and ought not to be disturbed.

3d. As to the point made by the appellant, that the verdict of the jury was not sustained by sufficient evidence, we have carefully examined the evidence in the record. There was certainly great conflict in the evidence, but it was for the jury to determine which of the witnesses was the more worthy of belief. We think there was evidence before the jury, on the trial of this cause, tending to support the material averments of the appellee's complaint. Where this is the case, this court has uniformly decided, as we now decide, that the decision of the court below will not be reversed by this court, upon the mere weight of the evidence.

The judgment of the court below is affirmed, at the appellant's costs.

The Board of Comm'rs of Lagrange Co. et al. v. Rogers et al.

THE BOARD OF COMM'RS OF LAGRANGE CO. ET AL. v.
ROGERS ET AL.

55	207
139	134
139	272

WILL.—Charitable Uses.—Devise to County.—Capacity of County to Take.—

Beneficiaries.—A testator devised "to the commissioners of" a certain county, "and to their successors in office, forever, * * * in trust and for the use and benefit of the orphan poor, and for other destitute persons, of said county," all his real estate therein; and also, in like manner, for the support and education of such persons and for the improvement of such real estate, all his "other property of every description;" directing that the latter be converted into money, by executors named, and, after the payment of debts, etc., the residue to be paid over to such devisee; and also directing that such real estate should never be sold, but be retained forever as a home for such persons. In an action instituted by the heirs of the testator, to set aside such will and obtain an order on such executors to pay to the plaintiff the proceeds of such "other property,"—

Held, that such devise is valid.

Held, also, that such county has the legal capacity to take and execute such trust.

Held, also, that such devise is sufficiently certain as to the beneficiaries thereof, and is one that can be executed.

SAME.—Court of Chancery.—Statute of Elizabeth.—A court of chancery has power, independently of the statute of 43 Elizabeth, to cause a devise for charitable uses to be upheld and executed.

From the Lagrange Circuit Court.

A. Ellison and *A. A. Chapin*, for appellants.

J. D. Ferrall and — *Morris*, for appellees.

PERKINS, J.—The appellees filed, in the Lagrange circuit court, on the 19th day of October, 1874, their amended complaint against the appellants, in which the following facts are stated:

That Daniel Rogers, on the 17th day of March, 1868, made his last will and testament in the county of Lagrange, State of Indiana; that he died on the — day of February, 1871, in said county of Lagrange, leaving no wife, father or mother, or brothers and sisters, except the plaintiff Susan Webster; that plaintiffs are next of kin, and are his heirs at law, and that decedent died the owner of real estate in Lagrange county, of the value of ten

The Board of Comm'rs of Lagrange Co. et al. v. Rogers et al.

thousand dollars, and personal property of the value of ten thousand dollars; that said will has been duly probated, and letters of administration issued to the defendants Nelson and Howard, who are named as executors in the will, and who have qualified, taken possession of the property of the testator, converted the personal estate into money, paid all the debts, and are about to pay the residue of the money over to the defendant the board of commissioners of Lagrange county, in accordance with the provisions of the will, a copy of which is filed with the complaint.

It is averred that the said devises and bequests, in said will contained, are void.

The prayer of the complaint is, that the bequest and trust in said will be declared void, and the plaintiffs be admitted to the enjoyment of the property, as the heirs at law of the decedent; that the executors be required to pay to them the money arising from the personal estate; and that the board of commissioners be enjoined from further interfering with said estate.

The appellants filed a demurrer to the complaint, which was overruled, and an exception reserved. They then answered by a general denial, and trial was had, and a finding by the court in favor of the appellees. A motion in arrest of judgment was then made, which was also overruled, and an exception taken, and judgment rendered in accordance with the prayer of the complaint, from which an appeal is taken by all the defendants below, to obtain a reversal of the judgment.

The errors assigned are, the rulings upon the demurrer to the complaint and the motion in arrest of judgment, which present really the same questions.

A copy of the will follows:

"I, David Rogers, of Clear Spring township, in the county of Lagrange, in the State of Indiana, do publish this, my last will and testament, in manner following, to wit;

The Board of Comm'rs of Lagrange Co. *et al.* v. Rogers *et al.*

"Item 1. I give and devise all of my real estate lying in said county of Lagrange, to the commissioners of the county of Lagrange aforesaid, and their successors in office, forever, in trust, however, for the uses and purposes hereinafter expressed, to wit; in trust and for the use and benefit of the orphan poor, and for other destitute persons, of said county, and I direct that said commissioners and their successors do retain said lands, and so improve and use the same as shall best secure the benefits of a home thereon, and a support and education therefrom, for said poor and destitute persons.

"Secondly. I give, devise and bequeath all of my other property of every description to said commissioners and their successors in office, forever, in trust, to be converted into money and used and invested as they, the said commissioners, shall think the most conducive to aid in the improvement of the lands first hereinbefore mentioned, and in the support and education of said poor and destitute persons. It is my will that the lands first hereinbefore mentioned shall be forever retained by said commissioners and their successors, for the purposes aforesaid, and that no portion thereof be sold or transferred, but that the same shall be forever kept, and known as the David Rogers Home, for the support and education of the orphan poor of Lagrange county, Indiana.

"I hereby appoint Dresden W. H. Howard, of Wau-seon, Fulton county, Ohio, and Erastus Nelson, of Clear Spring township, Lagrange county, Indiana, executors of this, my last will, and I direct, that, after my just debts and funeral expenses are paid, they proceed to reduce and convert all my property, except the real estate in Lagrange county, aforesaid, into money, and, after deducting their reasonable charges, that they pay the balance to said commissioners, to be used by them as above directed."

It is claimed that the devises in this will are void.

1st. Because the county, the trustee created by the

The Board of Comm'rs of Lagrange Co. *et al.* v. Rogers *et al.*

will, is incapable in law to accept and execute the trust. This objection is answered by the case of *Craig v. Secrist*, 54 Ind. 419, at this term.

2d. Because the trust is incapable of execution, and the beneficiaries of it too uncertain.

The same objection was made to the trust created by the will of George Dean, in the case of *DeBruler v. Ferguson*, 54 Ind. 549, at this term, a case involving the validity of the trust created by that will, a case directly in point as a precedent to this case, and the objections to the trust, in this case, are answered in the opinion delivered on the decision of that case. The opinions in both the above cases, delivered by Howk, J., settle every point made in the present case so clearly, that it would be pretentious in us to attempt to add to, in the hopes of strengthening, them.

We do, however, avail ourselves of the opportunity of showing that the decisions in these cases are supported by another authority in our State, and one entitled to the highest respect. It is the case of *M' Cord v. Ochiltree*, 8 Blackf. 15.

It will be borne in mind that the cases at the present term are decided without the aid of the statute of 43 Elizabeth, that statute not being in force in this State, according to the decision in the case of *Grimes' Executors v. Harmon*, 85 Ind. 198.

It will also be borne in mind, that, in each of these cases, a trustee, capable of taking and executing the trust, is named in the will, and has not declined the trust.

As we have already intimated, the decisions in the cases of which we are speaking rest upon the legal proposition, that the court of chancery has power, independently of the statute of Elizabeth, to uphold charitable devises, such as those are in the cases mentioned. Does the case of *M' Cord v. Ochiltree* support them? The case originated in a question or controversy arising upon a clause of

The Board of Comm'rs of Lagrange Co. *et al.* v. Rogers *et al.*

the will of John Ochiltree, who died in 1840. Among other bequests he made the following:

“After paying all the foregoing bequests, I give and bequeath unto the theological seminary at South-Hanover, in the State of Indiana, all the remainder of my estate, to continue a permanent fund, and the interest to be applied to the education of pious, indigent youths who are preparing themselves for the ministry of the Gospel, and those only who strictly adhere to the Westminster confession of faith in its literal meaning.”

The trust, created by the above provision of M'Cord's will, was sustained, and it was held by the Supreme Court of Indiana, that a court of chancery could cause it to be executed, independently of the statute of Elizabeth.

It will be observed that no territorial limits are prescribed by the will, within which the beneficiaries are to be selected.

DEWEY, J., in his opinion says:

“The legacy in controversy is void at law, because the objects of the testator's benevolence—pious, indigent youths preparing for the ministry of the Gospel according to a particular standard of faith—are too vaguely indicated to enable them to take the legacy without the interposition of a trustee; and because there was, at the death of the testator, no existing trustee capable of executing the trust intended to be created by the will. The theological seminary, being at that time an unincorporated society, could not execute a trust of that character, being the application of a permanent fund to a particular purpose, for the want of succession.”

Citing many authorities, he says:

“The English court of chancery, however, as we shall show, would give effect to such a legacy as a charitable trust.”

The learned and able Judge then proceeds to show that the courts in Indiana possess chancery powers, “in addition to the usual jurisdiction of a court of equity, of

The Board of Comm'rs of Lagrange Co. *et al.* v. Rogers *et al.*

taking cognizance of and protecting the persons, rights, and property of infants, idiots, and lunatics, and of superintending and enforcing charities. * * * *

“It is now well established (contrary to the opinions of distinguished chancellors and writers heretofore entertained), that the English court of chancery possesses an inherent jurisdiction which it has always exercised to enforce and effectuate charities, which at law were illegal or informal gifts. *Vidal et al. v. Girard's Ex'rs*, 2 Howard, 127, and the authorities there cited. But since the passage of the statute of the 43 Elizabeth, c. 4, commonly called the statute of charitable uses, the decisions have been founded principally upon that act; and the jurisdiction has been considered as confined to the charities therein enumerated, or to those which by analogy are within its spirit and intention. * * * It may therefore be proper, though it is not absolutely necessary to the decision of this cause, to inquire whether that statute is in force in this State.”

Here the Judge enters upon that inquiry, and comes to the conclusion that that act is in force in this State. This part, and this part only, of Judge Dewey's opinion, a part not material to the decision of the cause he was then considering, is overruled by the case of *Grimes' Ex'rs v. Harmon, supra*. The opinion in the case in Blackford, *supra*, next proceeds to demonstrate that the trust created, or attempted to be, by the will of John Ochiltree would be upheld and executed in chancery, independently of the statute of Elizabeth.

“That the English court of chancery will sustain, as a charity, a gift void at law, is established by numerous decisions. It will be necessary to quote but a few of them.” We omit the part of the opinion which follows, till we come to the notice in it of the case of *The Baptist Association v. Hart's Executors*:

“This case so far as it decided that the English court of chancery had no power to execute a charity, void at

Coombs v. Carr et al.

law, independently of the statute of Elizabeth, was overruled by the case of *Vidal v. Girard's Ex'rs, supra*, in which, after a very full review of all the authorities, it was held, 'That there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previously to the statute of Elizabeth.' Had such been the opinion entertained by the court in the case of *The Baptist Association v. Hart's Executors*, there can be no doubt that the legacy in that case would have been sustained as a charity. Our opinion is that the legacy under consideration, though void at law for the want of trustees capable, at the death of the testator, of taking or executing the trust, and on account of the vague indication of the objects of the charity, is valid as a charity, both in reference to the statute of Elizabeth, and to the law of charities in a court of equity as it stood before the passage of that act."

The judgment below is reversed, with costs; cause remanded with instructions to proceed in accordance with this opinion.

COOMBS v. CARR ET AL.

55	803
137	329

REDEMPTION.—Mortgage.—Foreclosure.—Judgment Creditor.—Parties.—Rights as between Judgment and Mortgage Creditors.—Where real estate, encumbered by a mortgage prior in lien to that of a mere personal judgment against the owner thereof, is first sold by the sheriff upon an execution issued on such judgment, and afterwards upon a decree of foreclosure of such mortgage, rendered in a proceeding therefor, whereof the purchaser had no notice, and without redeeming from him he or his grantee may, either in an original action by him, to redeem, against the latter purchaser,

Coombs v. Carr *et al.*

or by a counter-claim in an action by the latter against him to quiet title, have an accounting of the amount actually due to such latter purchaser, and obtain a decree allowing him to redeem by paying such amount so to be found due.

SAME.—Tender.—To redeem in such action it is not necessary that, prior to the commencement thereof, such junior claimant shall have tendered the amount due to the holder of the prior claim, nor need he bring such amount into court; it being sufficient to offer, in his pleading, to pay whatever amount shall be found due.

QUERY.—In such proceeding, is the amount due to the holder of such prior lien determined by the amount for which his decree was rendered?

From the Clark Circuit Court.

J. H. Stotsenburg and *G. V. Hawk*, for appellant.

C. P. Ferguson, *J. T. Dye* and *A. C. Harris*, for appellees.

BIDDLE, J.—Action by appellees, against the appellant, to quiet the title to certain lands. The complaint avers that the appellees are the owners in fee-simple and in possession of the lands, particularly describing them, and that, by virtue of a certain sheriff's deed, the appellant claims title to the same, adverse to the appellees, which title is a cloud, etc. Prayer that the title may be quieted in the appellees.

Answer:

1st. General denial;

2d and 3d. Special paragraphs, which allege essentially the same facts.

The third paragraph may be stated as follows:

“That on the 27th day of May, 1872, at the May term of the court of common pleas of Clark county, one George Spriesterbach, by the consideration of said court, recovered a judgment, without relief from valuation or appraisement laws, against one Joseph Carr, as principal, and Williams Prather, as his surety, for the sum of four hundred and five dollars, and costs of suit, taxed at fifty-six dollars and forty cents. Afterwards, on June 25th, 1872, and while such judgment was in full force, unappealed from, unreversed and unsatisfied, the said judg-

ment plaintiff, George Spriesterbach, caused a writ of execution to be duly issued upon said judgment, under the seal of the said court, and attested by the clerk thereof, directed to the sheriff of said county, commanding him to levy the said sums of money of the property of said defendants, in said county of Clark, subject to execution. On the day when said judgment was rendered, immediately prior thereto, and up to the 20th day of October, 1873, the said Joseph Carr was the sole owner, in fee-simple, and in the possession, of the real estate described in the plaintiff's complaint, and he had then and since no other real estate whatever, and he had no personal property, goods or chattels in said county, or anywhere else, subject to execution. During all of said period of time he was a resident householder of Indiana, and the amount of personal property owned by him did not exceed three hundred dollars, and the same, before said sale, was set apart to him, in the manner prescribed by law, as exempt from execution. The said real estate in the complaint described was of the probable value of seven thousand five hundred dollars,—and that is now its cash value. At the date of said judgment there were four mortgage liens upon said real estate, thus particularly described. The first was dated August 10th, 1871, in favor of one Mordecai B. Cole, for one thousand two hundred and fifty-three dollars and eighteen cents. The second was dated August 15th, 1871, in favor of one David H. Coombs, for two thousand two hundred and eighty dollars and forty cents. The third was dated August 16th, 1871, and was in favor of James Carr, Rebecca Carr, Robert L. Howe and the present plaintiffs, David and Elisha Carr, for three thousand seven hundred and thirty-six dollars and seventy-five cents, in the aggregate, the amount apparently due each mortgagee being separately stated. And the fourth was dated November 13th, 1871, in favor of James Beggs, for five hundred dollars.

Coombs v. Carr *et al.*

“On the 26th day of June, 1872, by virtue of said writ of execution, the said sheriff levied the said writ upon the real estate of the said Joseph Carr, particularly described in the plaintiff's complaint, as the property of the said Joseph Carr. After due and legal advertisement, the said sheriff, on October 19th, 1872, sold the said premises, between the hours prescribed by law, at the court-house door, in Charleston, at public sale, to one John H. Stotsenburg, for the sum of ten dollars, cash in hand, then and there paid, he being the highest and best bidder therefor. On the said day, the said sheriff executed to the said purchaser a certificate of sale of the said premises, in due form of law, and on November 27th, 1872, the said purchaser duly assigned, in writing, the said certificate of purchase to this defendant. The said Joseph Carr and Williams Prather, or any other person legally authorized thereto, having failed to redeem the said premises within the period prescribed by law, the said sheriff, on October 20th, 1873, executed, acknowledged, and delivered to the defendant, a deed for all of the said premises, conveying to him all the interest of the said Joseph Carr therein, it being the same deed specified particularly in the plaintiff's complaint.

“The defendant further says, that, on the 1st day of October, 1872, the said David H. Coombs brought an action in the Clark circuit court, to foreclose his said mortgage, making as defendants thereto all of the said mortgage creditors above named, and the said Joseph Carr and his wife. The said defendants, mortgagees above named, all appeared in said action and severally filed their cross-complaints against the said Joseph Carr and wife, and such proceedings were had therein, at the October term, 1872, of the said Clark circuit court, with the consent of the said Joseph Carr and wife, that, on the 17th day of October, 1872, by the consideration of said court, judgments and decrees of foreclosure were rendered in favor of said David H. Coombs and said cross-

Coombs v. Carr et al.

complainants, of whom the plaintiffs herein formed a part, and against the said Joseph Carr and wife, for the amounts stated by the said parties above named, and agreed upon between them and said Joseph Carr and wife, to be due upon their several mortgages and the notes thereby secured, and this defendant avers that the judgments of foreclosure, therein rendered in favor of the said David and Elisha Carr, Robert L. Howe and Rebecca Carr, were for much more in amount than was actually due upon said mortgages and the notes secured thereby, as these plaintiffs then and there well knew.

“The said George Spriesterbach, or the said John H. Stotsenburg, or this defendant, were not either jointly or severally made parties in any manner to said foreclosure proceeding above recited, had no notice thereof by summons or otherwise, made no appearance thereto, gave no consent to said proceeding, and no judgment was rendered in said cause against them or either of them.

“Afterwards, an order of sale was issued on said decree of foreclosure, to the sheriff of Clark county, against the said Joseph Carr and wife, and on November 16th, 1872, the sheriff of Clark county, without any notice to this defendant or the said Stotsenburg, his assignor, sold whatever interest the said Joseph Carr and wife had in said premises, to the plaintiffs herein, for the sum of seven thousand five hundred dollars.

“On the same day, said sheriff executed and delivered to them a certificate of sale therefor, and on November 17th, 1873, the said sheriff executed and delivered to these plaintiffs a deed conveying to them whatever interest the said Joseph Carr and wife had in said premises. And the defendant says, that, although the said premises had been sold on October 19th, 1872, as hereinbefore recited, neither the plaintiffs herein, nor any of said mortgage creditors or judgment creditors above named, either redeemed or offered to redeem the said premises from the sale under the judgment of the said Spriesterbach.

Coombs v. Carr et al.

“ The plaintiffs herein have and claim no other title or right, legal or equitable, to said premises, than such, if any, as they have acquired in the manner above recited, by and through said sheriff’s deed. All the interest and right in said premises, either legal or equitable, which this defendant has in said premises, was acquired by him through the sheriff’s deed upon the sale under said Spriesterbach’s judgment, and he never has asserted or claimed any other right or interest therein. And, by virtue of said interest, he claims and desires to exercise the right to redeem the said mortgaged premises, by paying to the plaintiffs herein, the proper amount due to them upon a just and honest accounting, either in this action, if it can be had, or within a reasonable time hereafter, and he offers to pay whatever sum may be found due, upon a proper accounting.

“ Beyond such rights he asserts no claim whatever to said premises. Wherefore,” etc.

Demurrers alleging the insufficiency of the facts stated, as ground, were sustained to the second and third paragraphs of the answer, and exceptions reserved. The appellant then withdrew his answer in denial, and declined to further plead, whereupon the court decreed the title in the appellees.

By the facts alleged in each of the special paragraphs of answer, the appellant derives title to the land in controversy from a sheriff’s sale on a judgment at law, subject to senior mortgage liens. The appellees derive title from a sale under a decree of foreclosure of one of the senior mortgages, rendered subsequently to the sale under the judgment at law. None of the parties interested in the sale under the judgment were made parties to the suit of foreclosure. The appellees, who hold under the decree, bring this suit to clear off the title of appellant, who holds under the judgment, and to quiet the title in themselves. The appellant claims the right, and offers to pay off the older liens, and thus redeem and pro-

tect his title. This is the naked question. There are other facts averred in the answer, which fortify this position.

This court has frequently decided that a purchaser under a decree of foreclosure of a junior mortgage may redeem against a senior mortgage before foreclosure, and after foreclosure when he has not been made a party to the suit. *Proctor v. Baker*, 15 Ind. 178; *Murdock v. Ford*, 17 Ind. 52; *Julian v. Beal*, 26 Ind. 220; *May v. Fletcher*, 40 Ind. 575.

And in *Holmes v. Bybee*, 34 Ind. 262, it was held that a junior judgment creditor stands, in this respect, upon essentially the same ground.

In the latest reported expression of this court upon this question, it was decided that "The holder of a junior mortgage who has foreclosed his mortgage in a suit without making a senior mortgagee a party, and who has bought in the mortgaged premises at a sheriff's sale on the decree, has a right to redeem the mortgaged premises from the senior mortgage, though the senior mortgagee may have previously foreclosed his mortgage without making the holder of the junior mortgage a party to the action, and though the premises may have been sold by the sheriff on the decree and bought in by the senior mortgagee," etc. *Hasselman v. McKernan*, 50 Ind. 441.

We think these authorities are decisive of the question before us. In our opinion, each of the paragraphs demurred to is a sufficient answer to the complaint.

In cases of this kind, where the court can decree the amount due, and make it a lien on the land, it is not necessary to make a tender before the commencement of the suit, nor bring the money into court; it is sufficient to make the offer in the pleading to pay the amount when it is ascertained. *Seller v. Lingerian*, 24 Ind. 264; *Hunter v. Bales*, 24 Ind. 299; *Turner v. Parry*, 27 Ind. 163; *Kemp v. Mitchell*, 36 Ind. 249; *Lynch v. Jennings*, 43 Ind. 276; *Ruckle v. Barbour*, 48 Ind. 274.

Freed *et al.* v. Brown *et al.*

The judgment is reversed, with costs, cause remanded, with instructions to overrule the demurrers to the second and third paragraphs of the answer, and for further proceedings.

Petition for a rehearing overruled.

Howk, J., having been of counsel, was absent.

FREED ET AL. v. BROWN ET AL.

REAL ESTATE.—Action to Recover.—Pleading.—Insanity of Grantor.—Under the issue, formed by a general denial of the allegations of a complaint in the ordinary statutory form, to recover real estate, where the plaintiff has proved himself to be the legal heir of a deceased former owner of such realty, who died intestate, and the defendant has introduced in evidence and claims title under a deed from such ancestor, it is competent for the plaintiff then to introduce evidence that such ancestor, at the time of the execution of such deed, was a person of unsound mind.

SAME.—Evidence.—To establish that the grantor was a person of unsound mind, at the time of the execution by him of a conveyance of his real estate, it is not necessary to show, that, at that time, he had been so found, in a proceeding for that purpose, and was then under guardianship.

SAME.—Conveyance.—The conveyance of a person of unsound mind, made before he has been so found in a proceeding therefor, is voidable, merely.

SAME.—Statute Construed.—Words and Phrases.—By the phrase, "a person of unsound mind," as used in the 11th section of the act of May 29th, 1852, "defining who are persons of unsound mind," etc., (2 R. S. 1876, p. 598) is meant only a person who has been so found in a proceeding for that purpose under such statute.

From the Lawrence Circuit Court.

Wilson & Dunn, Voris & Dunn and Putnam & Friedley, for appellants.

Riley & Iseminger, N Crook and J. W. Tucker, for appellees.

Howk, J.—The appellees, as plaintiffs, sued the appellants, as defendants, in the Orange circuit court, for the recovery of certain real estate, in Orange county, Indiana.

55	310
127	444

55	310
132	484
133	426

55	310
135	593

55	310
139	74

55	310
142	535

55	310
145	102

55	310
154	872

55	310
170	504

Freed et al. v. Brown et al.

Appellees' complaint was in the usual form, in such cases, and appellants' answer was a general denial. There was a trial by jury, in the Orange circuit court, which resulted in a verdict for the defendants, the appellants in this case; and over the motion of the plaintiffs, now the appellees, for a new trial, and proper exceptions saved, the said Orange circuit court rendered judgment on the verdict.

The cause was then brought by the plaintiffs, now the appellees, on appeal, to this court, where the judgment of the Orange circuit court was reversed, and the cause was remanded to that court, with instructions to grant a new trial. That decision of this court is reported, under the title of *Brown v. Freed*, in 43 Ind. 253.

On the return of the cause from this court, to the Orange circuit court, on the application of the plaintiffs, now the appellees, the venue of the action was changed from the latter court, to the court below. There was no change made in either the pleadings or the issues. But a trial was had by a jury, in the court below, which resulted in a verdict for the appellees. And on written causes filed, the appellants moved the court below for a new trial, which motion was overruled by the court, and to this decision appellants excepted. And judgment was then rendered upon the verdict by the court below, from which this appeal is now prosecuted.

The appellants have assigned, in this court, five alleged errors,—the first four of which are improperly assigned, and are not available to the appellants, as here presented, for any purpose. The fifth alleged error is, that the court below erred in overruling appellants' motion for a new trial.

The causes assigned by appellants for a new trial, in their motion for that purpose, were as follows:

1st. The verdict was not sustained by sufficient evidence;

2d. The verdict was contrary to law;

Freed et al. v. Brown et al.

8d. Error of the court below, in admitting, over appellants' objection, testimony for the purpose of proving the insanity of Jacob Nidiffer;

4th. Error of the court below, in suppressing questions and answers, twelve and nineteen, of Thomas Trimble's deposition;

5th. Error of the court below, in suppressing parts of the depositions of John Nidiffer and Hettie Nidiffer;

6th. Error of the court below, in giving instructions numbered from one to eleven, both inclusive;

7th. Error of said court, in giving instructions numbered three, four, five and six, asked for by appellees; and,

8th. Error of said court, in refusing to give instruction number three, asked for by appellants.

But two questions are discussed by the learned attorneys of the appellants, in their argument of this cause in this court, and we will confine ourselves to the consideration and decision of the questions discussed, regarding all other matters of objection as, at least impliedly, waived.

On the trial of the cause, the appellees first showed title to the land in controversy, in one Jacob Nidiffer, under a deed dated August 28th, 1839; and it was admitted by appellants that, before the commencement of this action, the said Jacob Nidiffer had died, intestate, and that the appellees were his only heirs at law.

To meet the case thus made by appellees, the appellants gave in evidence,

1st. A deed from Jacob Nidiffer to Solomon Nidiffer, dated March 8th, 1853;

2d. A deed, dated October 3d, 1855, from Solomon Nidiffer to Richard D. Walters;

3d. A deed, dated February 28th, 1865, from Richard D. Walters to Josephine Freed, wife of Thomas Freed, the appellants;

In and by each of which deeds, the land in controversy

Freed et al. v. Brown et al.

was conveyed, in fee-simple, to the grantee named therein. And appellees admitted that each of the said grantees took possession of said land under his or her deed.

And the appellees then offered parol evidence, tending to prove, that, at the time the said Jacob Nidiffer executed the said deed conveying the said land to Solomon Nidiffer, the said Jacob Nidiffer was a person of unsound mind, and that this was known to said Solomon Nidiffer when he accepted said deed. To the admission of which evidence the appellants objected, "on the ground that the question of the sanity or insanity of said Jacob Nidiffer did not arise and could not be tried upon a complaint in the ordinary or statutory form, for the recovery of real estate." But the court below overruled the objection, and admitted the evidence, and to this decision the appellants excepted.

It will be observed that the gist of this objection is, that the sanity or insanity of the maker of a deed, at the time of its execution, is a question that does not arise, nor can it be tried, upon a complaint in the ordinary or statutory form for the recovery of real estate. It was not an objection to the character, quality or weight of the evidence offered; but the objection went directly to the admission of any evidence, of any character, quality or weight, upon the sanity or insanity of the maker of a deed, at the time of its execution, where, as in this case, the complaint in the action was in the ordinary or statutory form for the recovery of real estate. This is precisely the same objection, which the appellants successfully urged to the same evidence, on the former trial of this cause, in the Orange circuit court, and the evidence was then excluded. On the former appeal of this cause, to this court, BUSKIRK, J., thus stated the positions of the appellants, then the appellees, in support of their objection to the offered evidence:

"The positions assumed by counsel for appellees are, that the plaintiffs in their complaint claimed to be the

Freed *et al.* v. Brown *et al.*

owners in fee and based their right of recovery upon the legal title; that the legal title was shown to be in the defendants; that a claim to recover the possession of real property can not be sustained by proof of an equitable title; and that where the legal title is vested in the defendant, the plaintiff can only recover upon an equitable title, by alleging in his complaint the facts showing the nature of his title." *Brown v. Freed, supra*, on p. 254.

And after fully considering the objection to the offered evidence, and the positions of counsel in support of said objection, BUSKIRK, J., said, in conclusion,

"We think the court erred in excluding the evidence."

When, therefore, on the trial of this cause in the court below, the appellants made the same objection, couched in precisely the same language, to the same evidence, the court below, in conformity with the express decision of this court, in this cause, overruled the appellants' objection, and admitted the offered evidence. In our opinion, the former decision of this court, on this point in this cause, was correct; and the court below committed no error in overruling appellants' objection and admitting the offered evidence.

The argument of appellants' attorneys, on the point now under consideration, is not very clear; but, if we understand correctly their position in this court, it is, that the only admissible evidence, to show that the maker of a deed, at the time of its execution, was of unsound mind, would be the record of a court of competent jurisdiction, showing that such maker was, at the time, under guardianship as a person of unsound mind. This is an objection to the competency, only, of the offered evidence, to prove the insanity of the maker of the deed; while in the court below, the objection urged to the offered evidence was, that the question of the sanity or insanity of the maker of the deed did not arise and could not be tried upon an ordinary or statutory complaint for the recovery of real estate. But in our opinion appellants'

objection in this court, to the evidence admitted in the court below, is not any more tenable than the objection urged in the latter court and already considered. The evidence offered was both admissible and competent, and its weight was a question for the jury.

The other question discussed by the appellants' attorneys, in their brief of this cause, relates to the instructions of the court below to the jury, and this is a much graver question, and worthy of more careful consideration.

When this cause was before this court on a former occasion, in giving the opinion of the court, BUSKIRK, J., said:

"The question involved was, whether Jacob Nidiffer had made a valid conveyance of such lands during his life. The fact was not denied that he had made a conveyance, but the point in contestation was, whether such conveyance was valid and effectual to pass the title. If he was sane at the time of making such conveyance, the title passed. If he was insane, the deed was void and no title passed, but remained in him during life, and upon his death descended to and vested in the appellants,"—now the appellees. *Brown v. Freed, supra*, on p. 257.

With this enunciation of the law of this State in regard to the deed of an insane person, before the court below, it is not surprising that that court, upon the trial of this cause, should instruct the jury, in very decided terms, that if they should find from the evidence that Jacob Nidiffer, at the time of making his said deed to Solomon Nidiffer, was a person of unsound mind, then said deed was void and passed no title.

Appellants' counsel say, that "the objectionable feature of these instructions is, that they inform the jury that the deed of a person of unsound mind is absolutely void." This is the only objection urged by appellants' attorneys, to the instructions of the court below; and they insist that where, as in this case, there had been no finding or

Freed et al. v. Brown et al.

adjudication, in the proper court, of unsoundness of mind, against the maker of a deed at the time of its execution, such deed is not absolutely void, but is voidable merely. And, in support of their position, they cite the decision of this court in the case of *Musselman v. Cravens*, 47 Ind. 1.

In his opinion in the case last cited, in speaking of the former decision of this court in this cause, BUSKIRK, J., said:

“In *Brown v. Freed*, 43 Ind. 253, we inadvertently held the deed of an insane person, where there had been no office found, void, when it should have been held voidable merely, and on this point the opinion is modified.”

It is very clear, we think, that the language used in *Brown v. Freed*, *supra*, was inadvertently used by the learned and usually careful Judge who wrote the opinion of the court. Strictly speaking, the question as to whether the deed in that case was absolutely void, or merely voidable, was not then before the court. The only question then before the court seems to have been, whether the sanity or insanity of the maker of a deed was a question that did arise, and could be tried, upon a complaint in the ordinary or statutory form for the recovery of real estate; and that question, as we have already said, was correctly decided in the affirmative. The question is now fairly presented to this court, for the first time in this case, whether the deed of Jacob Nidiffer to Solomon Nidiffer, conceding Jacob Nidiffer to have been, at the time of his execution of said deed, a person of unsound mind, was absolutely void, or merely voidable. We will briefly consider this question.

By the 2d section of the statute of this State, entitled “An act concerning real property and the alienation thereof,” approved May 6th, 1852, it is provided as follows:

“Sec. 2. Persons of unsound mind and infants may

not alien lands nor any interest therein." 1. R. S. 1876, p. 361.

It will be seen from this provision, that persons of unsound mind and infants, so far as the mere right or power to convey lands is concerned, are classed together and clothed with the same disability. It has always been held, however, that the deed of an infant is not void, but merely voidable, and that, upon the removal of the disability, such deed may be either ratified or disaffirmed by the maker thereof. We know of no sound reason, either in principle or policy, why the same doctrine should not ordinarily apply to the deeds of persons of unsound mind, nor why such persons, upon the removal of their disability, should not have the same right or power, as infants have, to ratify or to disaffirm their deeds, made while under disability. On the contrary, there are many reasons, both of principle and policy, why the deeds and contracts of persons of unsound mind should not be held to be absolutely void, but merely voidable.

The broad and comprehensive meaning given by our law-making power to the phrase, "persons of unsound mind," is, of itself, a sufficient reason why the deeds and contracts of such persons should not ordinarily be held to be absolutely void, but merely voidable. It is provided by the 1st section of a statute of this State "defining who are persons of unsound mind," etc., approved May 29th 1852, as follows:

"The words 'persons of unsound mind,' as used in this act or any other statute of this State, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person." 2 R. S. 1876, p. 598.

Monomania is defined to be "a derangement of a single faculty of the mind, or with regard to a particular subject only." Our own experience teaches us that there are and have been, in this age of the world, men of education, culture and extraordinary intellect, who have ably filled and gracefully adorned some of the highest and most im-

Freed et al. v. Brown et al.

portant offices under our form of government, but who are or have been, in the strictest meaning of the word, undoubted monomaniacs. It would be absurd to say that the deeds or contracts of such men would be absolutely void. And yet we would be bound to hold that the deeds or contracts of such men were void, if we were limited to the literal meaning of the words used in the 11th section of the statute last referred to. This 11th section is in these words:

“Sec 11. Every contract, sale or conveyance of any person, while a person of unsound mind, shall be void.”
2 R. S. 1876, p. 601.

It is very clear to our minds that these words were not intended, and ought not, to be construed according to their literal import. They must be construed with reference to the context or other sections of the statute of which they form a part. And therefore we hold, that by the phrase, “a person of unsound mind,” as used in this 11th section, is meant a person who has been duly found, in a proceeding in conformity with the 2d section of the same statute, to be a person of unsound mind and incapable of managing his own estate, and for whom a guardian has been appointed, as required by the 3d section of the same statute. Taken in connection with the other sections of the statute, this 11th section is to be construed as though it read in this wise, “Every contract, sale or conveyance of any person, made after such person has been found, in a proceeding under the 2d section of this statute, to be a person of unsound mind and incapable of managing his own estate, and while he is under guardianship, as required by the 3d section of this statute, and before it has been determined, in the mode prescribed by the 10th section of this statute, that such person has become of sound mind again, shall be void.” But in our opinion the contract, sale or conveyance of any person of unsound mind, whose unsoundness of mind has not been judicially ascertained, and who is not under guar-

dianship, as provided for in this statute, is voidable merely and not void absolutely, and is subject to ratification or disaffirmance, upon the removal of the disability. This is the view taken by this court of this 11th section, nearly fifteen years ago, in the case of *Crouse v. Holman*, 19 Ind. 30. In that case, after quoting this 11th section, DAVISON, J., said:

“The section just recited is relied on by the appellant as settling the point under discussion. He contends, that under it the contract entered into by him, he being at the time of unsound mind, was absolutely void, and, in sequence, incapable of ratification. We are not inclined to adopt that conclusion. It is not pretended that Crouse, the defendant, had ever, under the provisions of the statute, been found to be ‘a person of unsound mind,’ and the result seems to be that that section does not strictly apply to the case at bar. Thus, it has been decided that ‘The deed of a person, *non compos mentis*, under guardianship, is void; that the decree and letters of guardianship take from him all capacity to convey; but the deed of such person, not under guardianship, conveys a seizin, it being voidable only, and not void.’ *Wait v. Maxwell*, 5 Pick. 217. In view of this decision, which seems to be correct, we deem the section above quoted as applicable alone to ‘a person of unsound mind,’ found to be so in the mode prescribed by the statute. At all events, the term ‘void,’ used in the section, when applied to the contract of a person *non compos*, not under guardianship, should not be taken in its precise technical sense, as contra-distinguished from ‘voidable.’ *Allis v. Billings*, 6 Met. 415. In that case it was held, that ‘A deed, conveying land, by a person when of unsound mind, was voidable only, and not void.’”

We think this is a true exposition of the law of this State on the subject now under consideration, and we certainly have no disposition to hold otherwise. There was no evidence before the court below, in this case, that

Freck v. Christian.

Jacob Nidiffer had ever, under the provisions of the statute, been found to be "a person of unsound mind," or that, as such person, he was ever under guardianship. His deed to Solomon Nidiffer was therefore voidable, merely, and not void, and the court below should have so instructed the jury.

In our opinion, the court below erred in its instructions to the jury, and, for this error of law, the appellants' motion for a new trial should have been sustained.

The judgment of the court below is reversed, at the appellees' costs, and the cause remanded, with instructions to grant a new trial.

Petition for a rehearing overruled.

55	320
132	597

55	320
134	265

55	320
155	655

55	320
171	717

FRECK v. CHRISTIAN.

EVIDENCE.—Highway.—Report of Viewers.—The report of viewers appointed by a county board to view a proposed location or change of a highway is not competent evidence for any purpose, upon the trial of such cause, on appeal to the circuit court.

From the Huntington Circuit Court.

B. F. Ibach and *G. W. Stults*, for appellant.

PERKINS, J.—Petition to change the location of a highway.

Christian and others were the petitioners. Freck remonstrated. The board of commissioners granted the change. Freck appealed to the circuit court. The cause was there tried by a jury, who found in favor of the change. The court ordered the change made. Freck appealed to the Supreme Court.

A bill of exceptions gives the history of the trial in the circuit court.

The only evidence given on the trial was the papers in

Emmons et al. v. Meeker.

the cause before the commissioners, accompanied by parol proof of notice of the petition for the change. To the giving of these papers, consisting of the report of the viewers, etc., the appellant objected on the ground of incompetency; but his objection was overruled, and he excepted. This ruling was made one of the grounds of a motion for a new trial, which motion was also overruled. This was error, for which the judgment must be reversed. *Kemp v. Smith*, 7 Ind. 471; *Brown v. McCord*, 20 Ind. 270; *Hays v. Parrish*, 52 Ind. 132; *Coyner v. Boyd*, ante, p. 166.

The judgment is reversed, with costs. Cause remanded, with instructions to proceed in accordance with this opinion.

EMMONS ET AL. v. MEEKER.

PROMISSORY NOTE.—Date.—Principal and Surety.—Authority to fill Blank.—

Where a promissory note, perfect in all its parts except that the date thereof is left blank, is signed by the makers as principal and surety, and entrusted by the latter to the former, for delivery to the payee, such principal has an implied authority to fill such blank by inserting therein the true date of its execution, but he has no authority to insert a date prior to the true one; nor has such payee, if he have knowledge of the true date of its execution and of the signing by such surety, as such, a right to accept such note with knowledge that such false date has been inserted in such blank.

SAME.—Alteration.—Pleading.—A verified plea, by a codefendant in an action upon a promissory note, alleging that he had executed the same as surety only, and that since he had signed the same, it had been altered by inserting a false date, prior in point of time to the true one, but not alleging that such alteration had been made since the delivery of said note, nor that it had been done with the knowledge of the payee, is insufficient on demurrer.

SAME.—Continuance.—Affidavit.—In an action upon a promissory note, where issue was made by one defendant, as surety, by a verified denial of its execution, he asked a continuance of the cause, upon his affidavit, alleging the absence of a witness by whom he could prove, that, after he had

Emmons *et al.* v. Meeker

signed such note, while it was in the possession of his codefendant, the principal, the latter, in the absence of the affiant, but in the presence of the payee, caused a false date, prior to the true one, to be inserted in a blank left for the date, and had then delivered the same to the payee. *Held*, that such facts were material to the issues in the cause, and that a continuance should have been granted.

SUPREME COURT.—Practice.—Harmless Error.—Error, in sustaining a demurrer to a good paragraph of a pleading, is not available on appeal to the Supreme Court, if the matters therein alleged could have been given in evidence under a remaining paragraph.

From the Fountain Circuit Court.

M. Milford, for appellants.

L. Nebeker and *S. M. Cambern*, for appellee.

Howk, J.—In this action, the appellee, as plaintiff, sued the appellants and one William W. Ennis, administrator, etc., of Elkanah Clark, deceased, as defendants, in the court below, upon a promissory note, of which the following is a copy:

“\$1,100.

ATTICA, September 19th, 1873.

“Twelve months after date, we promise to pay to the order of Usual H. Meeker, eleven hundred dollars, value received, with ten per cent. interest from date until paid, without any relief whatever from valuation or appraisement laws. If this note is not paid at maturity, the undersigned agree to pay expenses of collection, including attorney’s fees. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

(Signed)

“E. CLARK,

“JOHN G. EMMONS,

“T. ODELL.”

The appellee’s complaint alleged, in substance, that the appellants and said Elkanah Clark, in his lifetime, by said note, on September 19th, 1876, promised to pay the appellee eleven hundred dollars, and attorney fees in case of suit, which remained unpaid, and a copy of said note was filed with said complaint; that said Elkanah Clark died on the — day of —, 187—, and said William

Emmons et al. v. Meeker.

W. Ennis was, on May 25th, 1874, duly appointed administrator of said decedent's estate, by the court below, and entered upon the execution of his said trust; and appellee prayed judgment for one thousand five hundred dollars, including a fee of one hundred and fifty dollars for his attorneys, and for all proper relief.

Each of the appellants separately answered, in three paragraphs, the appellee's complaint; but as the matters stated in the answers of both the appellants are substantially the same, we will set out the answers of only one of the appellants.

The first paragraph of each of the said answers was a general denial of each and every allegation of appellee's complaint.

In the second paragraph of his answer, each appellant alleged, in substance, that the said supposed writing obligatory, to wit, the note described in appellee's complaint, was not his, the appellant's, deed, and of this he put himself upon the country, and prayed judgment for costs.

In the third paragraph of his answer, each appellant alleged, in substance, that he signed the instrument declared on in appellee's complaint, before the same was altered as shown in said paragraph, as surety; that the appellant signed said instrument in the month of March, 1874; that since the appellant signed said instrument, the same had been materially altered, without appellant's knowledge or consent, in this, to wit, the following words and figures had been placed in said instrument, to wit: "September 19th, 1873;" and the appellant prayed judgment for costs.

The second and third paragraphs of each answer were duly verified by the oath of each appellant,—each verifying the said paragraphs of his own separate answer.

The appellee demurred separately to each of the second and third paragraphs of each answer, which demurrers were severally overruled as to each second paragraph, and severally sustained as to each third paragraph, and

Emmons et al. v. Meeker.

to the latter decisions each appellant excepted. The appellee then replied, although this was unnecessary, to the second paragraph of each of said answers, in denial thereof.

There was a judgment by default against the said Ennis, administrator, etc., of said Elkanah Clark, deceased, for the amount due on the note and attorney fees.

The issues joined between the appellee and the appellants were tried by the court below, without a jury, and the court found for the appellee and against the appellants, for the amount of the note, interest and attorney fees, and judgment was rendered accordingly.

Each of the appellants, upon written causes filed, moved the court below for a new trial; and each motion was overruled by the court, and to these decisions the appellants severally excepted. The evidence on the trial is properly in the record.

In this court, the appellants again severed in their assignments of errors; but as each appellant's alleged errors present precisely the same questions, we will consider them together. The alleged errors were as follows:

1st. The court below erred in sustaining appellee's demurrer to the third paragraphs of the appellants' answers;

2d. The court below erred in overruling appellants' motion for a continuance, upon their affidavit filed, for an absent witness; and,

3d. The court erred in overruling appellants' motion for a new trial.

These alleged errors we will consider, and decide the questions thereby presented, in their enumerated order.

1st. The third paragraph of each of the appellants' answers appears to have been cautiously worded. It is not averred in either of said paragraphs, that the alleged alteration of the note in suit was made after the delivery thereof to the appellee, or with his knowledge or consent.

We think, that the court below committed no error in

Emmons et al. v. Meeker.

sustaining the appellee's demurrer to the third paragraph of each answer. If we were wrong in this conclusion, it is very certain that the decision of the court below, sustaining appellee's demurrer to these paragraphs, did not injure the appellants in this case; for all the facts alleged in said paragraphs, or which could have been given in evidence thereunder, were or might have been properly given in evidence under the second paragraph of each appellant's answer.

2d. The second error complained of by the appellants is, that the court below erred in overruling their application for a continuance of the cause, on account of the absence of an alleged material witness. The appellants' affidavit for a continuance, and the decision of the court below thereon, are properly in the record by the bill of exceptions. The decision of the court below, on their application for a continuance, was also assigned, by each of the appellants, as one of the causes for a new trial, in his motion for such new trial. The question is therefore fairly presented for our decision, did the court below err in refusing the appellants a continuance?

In considering this question, it may be remarked, that the affidavit for the continuance was sufficient, in every particular, to entitle the appellants to a continuance, if the facts set out in the affidavit as the facts which they believed the absent witness would prove were material to the issues joined in the cause. These facts were stated in the affidavit as follows:

"That Elkanah Clark, one of the signers of the note in suit herein and principal thereon, but who is now deceased, came to the office of the said Poole," [the absent witness] "in the city of Attica, Fountain county, Indiana, some time in the month of March, 1874; that, at that time, at the request of the said Clark, he, the said Poole, filled up a blank promissory note, to wit, the note described and declared on in the complaint in this action, by writing all that part which now appears in said note

Emmons et al. v. Meeker.

in writing, except the date; that he, the said Poole, was requested by the said Clark not to place any date in the said note; that he, Poole, thereupon handed the note to said Clark, undated, who carried it away out of the said office of the said Poole; that in a few days afterwards the said Clark brought the said note back to the said Poole, signed by the said Clark, and signed by the defendants Emmons and Odell; that said Usual H. Meeker, of Fountain county, Indiana, and plaintiff herein, was then present; that the said Clark handed the note so signed, as aforesaid, to the said Poole, and directed the said Poole to insert the date; that the said Poole took the note and was about to insert the date then present, but the said Clark told him to date it back,—to date it September 19th, 1873, which the said Poole accordingly did.”

In our opinion, the facts above recited were material to the issues joined in this action, and if proved as recited, by a credible witness, they might have had, and very possibly would have had, great weight in the proper decision of this cause. It is the law that, ordinarily, where a person signs his name to a blank note and then entrusts it to another party for delivery or negotiation, the former thereby clothes the latter with an implied authority, which he is estopped from denying, to so fill up the blanks as he may choose, in order to make it a complete note. *Spitler v. James*, 32 Ind. 202. But this law has its exceptions and reasonable limitations; and especially is this so between the parties to the note, who are fully cognizant of the facts in relation to the execution of the note. In this case, all the blanks in the note were filled up, except the blank for the date, when the appellants signed the note and entrusted it to the principal therein for delivery. Undoubtedly the appellants, by entrusting the note to Clark, with a blank for the date unfilled, thereby authorized him to fill such blank with the true date of the execution of the note. As between the appellants and Clark, that was all that Clark was

Emmons et al. v. Meeker.

authorized to do in the premises,—to fill the blank for a date with the true date of the execution of the note. Of course, we are speaking only of the authority implied by and from the blank space for a date left in the note, for it is not pretended that Clark had any express authority from the appellants to fill any blank in said note. As between the appellants and the appellee, if it be true, as claimed, that appellee was cognizant of the blank in the date of the note, at the time it was signed by the appellants, he had no right to rely upon any merely implied authority to Clark, to fill up the blank for a date with any other date than the true date of the execution of said note. If it be true, as claimed by the appellants, that the appellee knew, at the time the note was delivered to and accepted by him, that the note had been executed by the appellants, as sureties only, in the then month of March, 1874, payable one year after date, and that the date was a blank when the appellants executed the note, then the appellee had no right to believe, or to rely upon such belief, that Clark was impliedly authorized to fill the blank in the date of the note with any other date than the true date of the execution of said note, or that such implied authority would enable Clark to so fill in the blank for a date as to make a note, which, on its face, was payable one year after date, to be payable, in fact, six months after the date of its execution. For if, in this case, from the facts alleged to exist, it can be correctly said that the appellants impliedly authorized Clark to fill the blank with any other date than the date on which the note was executed, then it must be said that he was in like manner authorized to antedate or postdate the execution of the note, without limit as to time, to suit his own purposes. In our opinion, the appellants did not give Clark any such implied authority, by merely entrusting him with the note for delivery, without the blank for the date of the note having been filled. If the appellee received the note for value, without notice of the fact that it had been ante-

Emmons et al. v. Meeker.

dated by Clark, after its execution by the appellants, then the latter might be bound by the act of Clark; even if he had no authority from them to antedate the note. But if the appellee, at the time he received the note, had knowledge of the fact, that, after its execution by the appellants, in March, 1874, in their absence, and very probably without their knowledge or consent, the note had been dated back, by Clark's direction, to September 19th, 1873, we think that these facts would have been material to the issues joined in this action, and that, if proved on the trial, they ought to have been, and no doubt would have been, entitled to great weight in the proper decision of this cause. We do not decide that these facts, if proved, would entitle the appellants to a decision in their favor, for possibly these facts, if proved, might be controlled by other facts and circumstances in connection with this transaction.

All that we decide is, that, in our opinion, enough was shown in appellants' affidavit to entitle them to a continuance, and that such continuance was apparently necessary to a full and fair trial of this action.

The view which we have taken of this question renders it unnecessary for us to consider the third alleged error. We think that the court below erred in overruling the appellants' motion for a continuance of this cause, and for this error, the judgment of that court is reversed, as to the appellants, at the cost of the appellee.

The cause is remanded, with instructions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

BIDDLE, J., dissents, holding that the affidavit was insufficient to authorize a continuance, for reasons shown in the case of *Emmons v. Carpenter*, *post*, p. 329, decided at the present term.

Emmons et al. v. Carpenter.

EMMONS ET AL. v. CARPENTER

From the Fountain Circuit Court.

M. Milford, for appellants.

J. H. Valiva, H. H. Stilwell and T. L. Stilwell, for appellee.

PER CURIAM.—A majority of the court hold that this case is the same in principle as the case of *Emmons v. Meeker*, ante, p. 321, decided at the present term.

The judgment is therefore reversed as to the appellants. Cause remanded for further proceedings.

BIDDLE, J., dissented, and delivered the following opinion:

Suit on a promissory note made by Elkanah Clark, John Emmons and Tellmachus Odell, payable to the order of Daniel Carpenter, twelve months after date, dated September 19th, 1873, for eleven hundred dollars, with ten per cent. interest. Emmons and Odell, each, separately answered the complaint:

1st. General denial;

2d. *Non est factum*, verified; and,

3d. *Non est factum*, stating the particulars, namely, "that he signed the said instrument in the month of March, 1874. That since this defendant signed the said instrument, the same has been materially altered, without the knowledge or consent of this defendant, in this, to wit: The following words and figures have been placed in said instrument, viz.: 'September 19th, 1873.' And this defendant prays," etc.

* The third paragraph was stricken out on motion, and exceptions reserved. There is no error in this ruling. The second paragraph is the same in legal effect as the third. The same evidence could be given under either.

William W. Ennis, administrator of the estate of Elkanah Clark, deceased, who was also sued and served with

Emmons et al. v. Carpenter.

process, made default. No question as to him is presented in the record.

The court overruled a motion to continue the cause, founded on affidavit stating that the appellants could prove by an absent witness, Joseph Poole, that Clark, one of the makers of said note, handed the note, signed by all the makers, but without date, to the witness, Poole, and directed him to insert the date of "September 19th, 1873," as it stands in the note. The affidavit, if sufficient in all other respects, is insufficient in not stating that Clark, their co-maker of the note, was not authorized by the other makers to have the date inserted as it appears in the note. The note having been signed by all the makers, with a blank left for the date, carried upon its face the presumptive authority to fill the blank with the proper date, as agreed upon by the parties. *Webb v. Baird*, 27 Ind. 368. This presumption is not negatived in the affidavit. All the facts stated in it may be true, if such authority was given, and the defendant not injured in the least thereby. It is therefore insufficient, and the court committed no error in overruling the motion for a continuance founded upon it.

A trial by the court was had on the issues made by Emmons and Odell, and a finding in favor of the appellee, for the amount of the note. By a motion for a new trial, the appellants raised the question of the sufficiency of the evidence to sustain the finding of the court, which is the only remaining question presented for our consideration.

The evidence proves the following facts, and which, I believe, are not essentially disputed by the appellants, viz.:

That the note in this action was given to take up an old note, which matured on the day on which the new note is dated; that the new note was executed in March, 1874, leaving the date blank; that the date was afterwards inserted to correspond with the maturity of the old note, without the knowledge or consent of Emmons or Odell, except such authority as the face of the note, left blank

Wilds *et al.* v. Bogan.

as to its date with the knowledge of all the makers, might imply. All the makers of the new note were also makers of the old note, and knew the purpose for which the new note was executed, namely, to take up the old one.

It seems to me that these facts show a decided preponderance in favor of the finding. The fact that the makers signed the note, knowing that the date was left blank, implies that the date was not to be filled as of the day it was signed; for, if it was to be dated as of that day, I can perceive no reason why the date was not filled at the time they signed the note. And when the makers signed the note, and knowingly left a blank for the insertion of the date, and passed the note from their possession, they, by these acts, authorized any one interested in the note to fill the blank date. *Johns v. Harrison*, 20 Ind. 317; *Grimes v. Piersol*, 25 Ind. 246; *Piersol v. Grimes*, 30 Ind. 129; *Spitler v. James*, 32 Ind. 202; *Wilson v. Kinsey*, 49 Ind. 35; *Rich v. Starbuck*, 51 Ind. 87.

I think the judgment should be affirmed, with costs.

WILDS ET AL. v. BOGAN.

FRAUD.—Conveyance to Defraud Creditors.—Action to Subject Land to Execution.—Husband and Wife.—Lands purchased with the means of a judgment debtor having no property subject to execution, and by him procured to be conveyed to himself and wife jointly, with the right of survivorship, for the purpose of defrauding his creditors, may be subjected to an execution upon such judgment, in an action for that purpose, against such grantees.

SAME.—Alteration of Conveyance.—Such action may be in like manner sustained, where such conveyance has first been so procured and made to the debtor himself and afterwards changed by inserting the name of his wife, with a clause of survivorship.

SAME.—Evidence.—On the trial of such cause, if the evidence does not identify such land nor show any title thereto in such debtor, nor by whom

Wilds et al. v. Bogan.

the purchase-money therefor was paid, judgment should be rendered for the defendants.

NEW TRIAL.—*Cause.*—Where the cause relied upon in a motion for a new trial is error of law occurring on the former trial, such error must be particularly specified in such motion.

From the Boone Circuit Court.

W. B. Walls and J. Claybaugh, for appellants.

J. N. Sims, L. McClurg and J. V. Kent, for appellee.

BIDDLE, J.—Complaint by appellee, averring that at the October term of the Clinton circuit court, 1871, by the consideration of said court, she recovered a judgment against William W. Wilds, for a breach of promise of marriage, for seven hundred dollars and costs, and which remains wholly unpaid. That, on the 17th day of January, 1871, said William W. Wilds fraudulently, with the intent to hinder, delay and defraud his creditors, particularly the appellee, caused lot sixteen, in the town of Kirklin, Clinton county, to be conveyed to the said William W. Wilds and his co-appellant Mary B. Wilds, his wife, with the right of survivorship therein. That the property was purchased with the assets of William W. Wilds, alone, all with the knowledge and consent of the said Mary. That the said William has no other property whereof to make the plaintiff's judgment.

A second paragraph of complaint alleges the same facts, with the exception that it charges that the title of the lot was first taken in the name of William W. Wilds, solely, and afterwards changed by inserting the name of Mary B. Wilds in the deed, and to the survivor, as averred in the first paragraph. The venue was changed from the Clinton circuit court, to the Boone circuit court.

A demurrer to each paragraph of the complaint, alleging an insufficiency of facts as ground, was overruled and exceptions taken.

Answer in denial; trial by jury; verdict for appellee; motion for a new trial; causes filed, assigning,

Wilda et al. v. Bogan.

"1st. That the verdict is not sustained by sufficient evidence;

"2d. That the verdict is contrary to law;

"3d. Error in law arising during the trial; and,

"4th. Error of the court in charging the jury."

Motion overruled, exceptions, judgment subjecting the lot to sale to pay the appellee's judgment.

We are of opinion that each paragraph of the complaint is sufficient.

The motion for a new trial raises but a single question,—the sufficiency of the evidence to sustain the verdict. The third and fourth causes for a new trial are too indefinite to raise any question, as we have often decided, and the third cause being insufficient, no cause is presented by the second. The evidence is before us, and it is clearly insufficient. It shows the recovering of the judgment in favor of the appellee, as averred in the complaint, by introducing the record. Then two witnesses testify about a deed, but the parties to the deed are not fully named, what deed they are testifying about is not mentioned, no description of the property is given, nor whose money paid for it; no deed is introduced in evidence, nor the record of the deed, nor their absence accounted for; in short, there is no evidence in the case showing that any title, or scarcely tending to show that any title, of the property described in the complaint, is in William W. Wilda. The verdict cannot be sustained.

The judgment is reversed, with costs. Cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

Rothrock et al. v. Carr et al.

ROTHROCK ET AL. v. CARR ET AL.

BOARD OF COMMISSIONERS.—*Powers.—Appropriation.—Common Schools.—Injunction.*—A county board has no authority to make an appropriation of any sum, out of the general fund of their county, for the erection of a school building; and, if made, its payment may be enjoined, in an action for that purpose, by a taxpayer of such county.

SAME.—*Statute Construed.—Discretionary Allowance.*—Section 7 of the act of May 27th, 1852, "to authorize and limit allowances," etc., (1 R. S. 1876, p. 63) does not authorize county boards to "make allowances at their discretion" for purposes unauthorized by law.

From the Carroll Circuit Court.

A. W. Reynolds and *D. Turpie*, for appellants.

J. A. Stein, for appellees.

BIDDLE, J.—On the 12th day of March, 1870, the board of commissioners of White county made the following order:

"That an appropriation of twelve thousand five hundred dollars be and is hereby made to the school trustees of Monticello, to be expended upon the new school building; and the county auditor is hereby authorized to issue orders upon the county treasurer, in sums of twenty-five, fifty and one hundred dollars. Two thousand dollars payable at sight, four thousand dollars payable in six months after date, three thousand two hundred and fifty dollars due twelve months after date, and three thousand two hundred and fifty dollars due eighteen months after date, without interest,—all of which is finally ordered."

Forgus Alkire and John P. Carr brought this action to enjoin the issue and payment of said county orders, alleging that they were and are citizens and taxpayers of White county. A temporary restraining order was allowed by the court. An answer of general denial and five special paragraphs was filed to the complaint. Demurrers, alleging as ground the insufficiency of the facts stated, to each of the special paragraphs were sustained,

55	834
160	104
55	834
162	173

Rothrock et al. v. Carr et al.

and exceptions taken. The venue was changed to the Carroll circuit court, wherein a trial by the court was had, on the issue of general denial, and the facts alleged in the complaint found to be true. Over a motion for a new trial, and exceptions, the court made the injunction perpetual. Appeal.

The counsel for appellants rightly put the main question in the case :

“Whether the board of commissioners had the authority, under the law, to make the allowance which they did in aid of the erection of the school building?”

And they attempt to justify the action of the board under section 7, 1 R. S. 1876, p. 63, which enacts as follows :

“The board of commissioners may make allowances at their discretion: But it is hereby declared to be their duty to avoid as much as possible the necessity for making any allowance for voluntary service, or for things voluntarily furnished, by contracts for such services or things, or by ordering the same to be rendered at stipulated prices, or by vesting the power to procure such services or things in an agent, by them nominated of record.”

The words to “make allowances at their discretion,” as used in the above section, mean to make allowances according to law, at their discretion. They do not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no law there is no act to do, and, therefore, no discretion to be exercised. They mean a legal discretion, not a personal discretion; for to allow the board a personal discretion would give them the power to make law. This power is confided to another branch of the government, and carefully guarded by the constitution. There are many cases wherein a board of commissioners may or may not exercise a lawful authority, according to their discretion; and many cases wherein, having lawful au-

Glass v. Garber *et al.*

thority to do an act, they may do it at this or that time, or in this or that manner, according to their discretion; but there is no case wherein they may, at their discretion, do an act which is not authorized by law. We are not aware of any law authorizing a board of commissioners to donate funds to be expended upon a school building, out of the general funds in the county treasury. Similar questions have often been before us. In the case of *Warren County Agricultural Joint Stock Co. v. Barr*, ante, p. 80, at the present term, the principle was fully considered.

The order of the board of commissioners was without authority and void.

The judgment is affirmed, with costs:

GLASS v. GARBER ET AL.

DAMAGES.—Measure of.—Nominal.—Contract to Publish Legal Notice.—

Breach.—Newspaper.—Liquor Dealer.—A complaint for damages alleged that the plaintiff, a retailer of intoxicating liquors, licensed under the law of this State, to obtain a renewal of such license, then about to expire, paid to the defendant, the proprietor of a weekly newspaper, a certain sum, for which the latter agreed to publish, in such newspaper, a sufficient, timely notice of the plaintiff's intention to apply to the proper county board for such license; but that, on account of the defendant's failure so to do, the plaintiff had failed to obtain such license, and was compelled to suspend such business for a certain period.

Held, on demurrer, that such cause of action is sufficient to entitle the plaintiff to more than nominal damages.

Held, also, that the plaintiff is entitled to damages in at least the amount of such price so paid.

Held, also, that such price, though but three dollars and fifty cents, is not so small as to bring the cause, on appeal to the Supreme Court, within the rule, *de minimis non curat lex*.

Held, also, that the fact that the plaintiff's business property was rendered useless during and by such suspension of business should be considered in estimating his damages.

Glass v. Garber et al.

Held, also, that mere speculative profits which the plaintiff might have realized during such suspension of his business, if it had not been suspended, are not a proper basis upon which to assess his damages.

SAME.—Custom.—Surplusage.—An allegation in such complaint as to a custom in the defendants of themselves furnishing copies of the forms of such notices is mere surplusage.

From the Jefferson Circuit Court.

C. A. Korbly, for appellant,

W. T. Friedley, J. R. Cravens and J. Y. Allison, for appellees.

BIDDLE, J.—Action by the appellant, against the appellees.

Complaint in two paragraphs.

The first alleges, in substance, "that the defendants, at, etc., were partners, doing business under the firm name and style of M. C. Garber & Co., and, as such, were engaged in printing and publishing a public weekly newspaper, called the Madison Weekly Courier, at said county; that at the same time, the plaintiff was the proprietor of a saloon on Main Cross street, in the city of Madison, in said county, and engaged in the business of selling intoxicating liquors in a less quantity than a quart at a time, to be drank in said saloon; that the plaintiff had, for many years, been engaged in that business, and had the proper license therefor. That, on February 5th, 1872, the plaintiff's license being about to expire, and he being desirous to renew the same, the defendants, in consideration of the sum of three dollars and fifty cents, then paid them by the plaintiff, agreed to publish a notice in said weekly newspaper, such as is required by the statute in such case made and provided, twenty days before the first day of the meeting of the board of commissioners hereinafter named, that the plaintiff would apply to the board of commissioners of Jefferson county, Indiana, at their then next ensuing March term, in said year 1872, for a license to sell intoxicating liquors in a less quantity.

Glass v. Garber et al.

than a quart at a time, at said saloon on Main Cross street aforesaid. That the notice which the defendants agreed to publish was substantially as follows: (Here a copy of an ordinary notice of application for license is set out, but it is unnecessary to transcribe it.) That the defendants had published a similar notice for the plaintiff a year before, and had the proper form on their files, which was well known to both parties; and the defendants made said agreement without requiring the plaintiff to furnish any form or copy of said notice, but it was the intention of both parties that the defendants should set up the notice from the one previously published by them. That at the time of the agreement, the plaintiff's license had but twenty-seven days to run, and expired on March 6th, 1872, which the defendants well knew; but the defendants, not regarding their promise, failed and neglected to publish the said notice in their said newspaper, twenty days before the first day of said term of said commissioners' court, whereby the plaintiff was unable to procure such license at said term. That the plaintiff did not discover that the defendants had not complied with their agreement, until it was too late to have the same published elsewhere. That by reason of the defendants' failure to comply with their agreement, the plaintiff was compelled to, and did, close up his said saloon, and was prevented from carrying on his said business for thirty days, successively, until, by publishing another notice, in another paper, he was enabled to procure another license, which was procured by him on April 8th, 1872. That the plaintiff's business, during the thirty days, was [would have been?] worth fifteen dollars per day, above expenses, which the plaintiff lost by being compelled to close up his saloon, etc. Wherefore," etc.

The second paragraph was much like the first. It alleged that, on March 6th, 1871, the plaintiff procured a license "upon a notice published by the defendants," and that, on February 5th, 1872, the defendants, for the con-

Glass v. Garber et al.

sideration specified in the first paragraph, agreed to make the publication of the notice, but it does not allege that "The defendants made such agreement without requiring the plaintiff to furnish any form or copy of said notice, but it was the intention of both parties that the defendants should set up the notice from the one previously published by them." It contained, however, the following averments, which were stricken out, on motion of the defendants, and the plaintiff excepted:

"The plaintiff says, that the defendants had often before published like notices for the plaintiff, and publicly solicited that kind of business, and had a description of the locality thereof; and the plaintiff says, it was the custom and manner of doing business at the defendants' said printing and newspaper office for said defendants to prepare the form of notices for application for license for the compositors and printers, especially where they had formerly published a like notice for the same party, and not to require the party for whom the notice was published to procure any written notice or form of notice for their printers; and the plaintiff says, that said contract was made with tacit reference to said custom and manner of doing business, and the defendants well knew the form of notice which the plaintiff desired to have published, and, knowing the same, agreed to do it as hereinbefore alleged."

After the matter above indicated had been stricken out of the second paragraph, separate demurrers were filed to each paragraph, for want of a statement of sufficient facts, which were sustained, and the plaintiff excepted. The plaintiff declining to amend, final judgment was rendered for the defendants.

The errors assigned call in question the correctness of the ruling in striking out a portion of the second paragraph, and in sustaining the demurrers to each paragraph of the complaint. There was no error committed in striking out the portion indicated from the second para-

Glass v. Garber et al.

graph. The averment was useless by itself, and in no wise useful to the other allegations.

It is contended by the appellees that the complaint, at most, but shows a case for nominal damages. This court would not reverse a case, perhaps, when nothing more than nominal damages are involved, but when a considerable amount of costs, or other legitimate expenses, depend upon nominal damages, which are wrongfully denied the party, it might become proper ground for reversing a judgment. But we are not convinced that each of the paragraphs in this complaint entitle the appellant to only nominal damages. Nominal damages are such as a party is entitled to for a mere nominal breach of his rights, where no actual damages have been suffered,—*damnum absque injuria*—and may be a cent, five cents, or a dime, or such insignificant sum in relation to the case as would fall within the maxim, *de minimus non curat lex*. In this case, however, the appellant alleges that he paid the appellees three dollars and a half for inserting the advertisement, which was never inserted. We think he is entitled by the facts averred, to recover this amount, at least; and we can not hold that three dollars and a half, in reference to the present case, is no more than nominal damages, especially where a considerable amount of costs must depend upon them. And we think, if, in consequence of the facts averred, the complainant's house and fixtures therein and place of business became useless to him for a time, that it is a fair element for a jury to consider, in estimating the damages the appellant may have suffered; and perhaps there may be other proper grounds for damages, which we do not mention, but we are of opinion that the mere problematical, uncertain, contingent, vague and speculative profits, upon expected sales of liquor by retail, which may or may not be made, do not constitute a proper basis upon which to assess damages. It must not be considered, however, that we are laying down a fixed rule by which to measure the damages in this case, be-

Studabaker et al., Ex'rs, v. Marquardt et al.

cause facts unknown to us may exist, or unexpected and contingent facts, of which we know nothing, may arise in the case, and which ought probably to be considered in estimating damages; but we are confident that the facts alleged in each paragraph of the complaint entitle the appellant to something more than nominal damages.

We think this conclusion rests upon correct general principles of law, and is supported by the following authorities: *The Shelbyville, etc., R. R. Co. v. Lewark*, 4 Ind. 471; *Fultz v. Wycoff*, 25 Ind. 321; *The Western Gravel Road Co. v. Cox*, 39 Ind. 260; *The New Haven Steam Boat, etc., Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 13 How. U. S. 101; *McAfee v. Crofford*, 18 How. U. S. 447; *Barrett v. Williamson*, 4 McLean, 589; *Jolly v. The Terre Haute Draw-Bridge Co.*, 6 McLean, 236; *White v. Moseley*, 8 Pick. 356; *The City of Cincinnati v. Evans*, 5 Ohio State, 594; *Eisenlohr v. Swain*, 35 Pa. State, 107.

The judgment is reversed, with costs. Cause remanded, with instructions to overrule the demurrer to each paragraph of the complaint, and for further proceedings.

55	341
124	112
125	73

STUDABAKER ET AL., EX'RS, v. MARQUARDT ET AL.

USURY.—*Mortgage Securing Usurious Contract.*—*Foreclosure against Purchaser.*

—The purchaser of real estate, with covenants of warranty and against incumbrances, in an action against him to foreclose a mortgage thereon, given by his grantor to secure a promissory note, can not avail himself, as matter of defence, of the fact that the debt for which such note was given was usurious.

SAME.—*Defence.*—*To whom Available.*—That a contract is usurious is a defence which is personal to the debtor, and is available only to himself, his creditors, representatives, heirs, or some one by him authorized.

SAME.—In this State usurious contracts are not void, but only voidable as to the part which is usurious.

Studabaker et al., Ex'rs, v. Marquardt et al.

From the Allen Circuit Court.

J. A. Fay, J. Morris and W. H. Withers, for appellants.

L. M. Ninde, for appellee.

BIDDLE, J.—John K. Evans, the deceased, made a usurious loan of money to William B. Daniels, who executed his promissory note for the amount, which was also secured by a mortgage on certain lands. Afterwards, Daniels sold the lands to Alfred Marquardt, received the purchase-money, and conveyed the same accordingly, with covenants of warranty and against incumbrances, Daniels agreeing to discharge the mortgage given by him to Evans. Marquardt afterwards, without the mortgage having been discharged, sold and conveyed the lands, with covenants of warranty and against incumbrances, to Alcie C. Huffman, who paid the purchase-money to Marquardt, with notice of the mortgage of Daniels to Evans. This suit was brought by Evans, against Marquardt and Huffman, to foreclose the mortgage and sell the lands. Daniels was not made a party to the record. Mrs. Huffman, in various paragraphs of her answer, sets up the usury in the loan made by Evans to Daniels, as so far a bar to the action. A statement of the pleadings may be dispensed with, as no question arises upon them, which, in the view we take of the case, needs to be decided. The issues are sufficient to sustain the verdict, which is in the following words:

“We, the jury, not being advised upon the law, find a special verdict on the issues in this case, as follows:

“1st. We find that the notes in the complaint set forth were given by the said Daniels, to the plaintiff, on the 24th day of August, 1866, upon and in pursuance of an agreement between him and the plaintiff for a loan of money, which was as follows:

“The said Daniels applied to the plaintiff for a loan of money, and the said Evans agreed to loan the said Daniels the sum of eighteen hundred dollars, twelve hun-

Studabaker et al., Ex'rs, v. Marquardt et al.

dred thereof for one year, and six hundred thereof for two years, upon the said Daniels paying the said Evans eighteen per cent. in advance, thereon, to wit, the sum of four hundred and thirty-two dollars; that the said Daniels agreed to take said eighteen hundred dollars, and pay for the use thereof and as interest thereon the said sum of four hundred and thirty-two dollars, in advance. That thereupon the said Evans counted out and placed upon the table around which the parties were, eighteen hundred dollars, and the said Daniels then told the said Evans to take therefrom the eighteen per cent., which the said Evans did, amounting to four hundred and thirty-two dollars, and the said Daniels took the thirteen hundred and sixty-eight dollars.

“We further find, that the said Daniels agreed to pay, and did pay, said interest, [without] any coercion on the part of said Evans. That said payment, on the part of said Daniels, was made voluntarily and upon his own agreement.

“We further find, that it does not appear that the said Daniels authorized the defendant Huffman to make or set up the defence of usury in this case.

“We further find, that, after the execution of said mortgage in the complaint mentioned, the said Daniels sold and conveyed the premises therein described, to the defendant Marquardt, for the sum of three thousand one hundred dollars, which sum the said Marquardt paid to the said Daniels, before the commencement of this suit. That said conveyance, from the said Daniels, to the said Marquardt, contained covenants of warranty and against incumbrances; that said Daniels, at the time he sold and conveyed the said premises to the said Marquardt, agreed to pay and discharge said mortgage.

“We further find, that the said Marquardt, before the commencement of this suit, sold and conveyed said premises to the defendant Alcie C. Huffman, by deed, with covenants of warranty and against incumbrances; that said

Studabaker et al., Ex'rs, v. Marquardt et al.

last named defendant did not agree to assume or pay said mortgage; that she was to pay for said land three thousand one hundred dollars, or three thousand two hundred dollars, and the same was paid to the said Marquardt, at the time said deed was made; that the purchase was made by her mother, who knew of said mortgage.

“We further find, that said mortgage was duly recorded in Allen county, on the 27th day of August, 1866.

“We further find, [that] there was paid on said notes, on the 31st day of August, 1867, one thousand and seventeen dollars, and on the 31st day of December, 1868, one hundred dollars. If, upon the facts as above found, the court is of opinion that said contract was usurious, and that the plaintiff is not entitled to interest beyond six per cent. upon the thirteen hundred and sixty-eight dollars, from the time it was loaned, then we find for the plaintiff in the sum of four hundred and seventeen dollars and seventeen cents.

“And if, upon the facts found, the court is of opinion that said contract is not usurious, then we find for the plaintiff in the sum of eight hundred and thirteen dollars and eighty cents.”

After the verdict, several motions were made on behalf of the appellee Alcie C. Huffman, and exceptions taken to the rulings thereon, but no cross errors have been assigned; they are therefore not before us.

Evans then moved for a judgment in his favor for eight hundred and thirteen dollars and eighty cents, as found in the alternative by the verdict; the motion was overruled, and exceptions properly taken. Judgment was rendered in favor of Evans, for four hundred and seventeen dollars and seventeen cents. His executors appeal to this court.

The main question raised in the record and discussed by the parties is, can Mrs. Huffman avail herself of the usury suffered by Daniels, in defence of this action?

In *Stephens v. Muir*, 8 Ind. 352, this court held, that

Studabaker et al., Ex'rs, v. Marquardt et al.

the defence of usury was personal to the borrower and his heirs or representatives, and that a vendee of real estate, who purchased subject to a mortgage tainted with usury, could not avail himself of that defence, against a bill for foreclosure, unless it was by the consent of the party who made the contract and suffered by the usury. In *Conwell v. Pumphrey*, 9 Ind. 135, it was held, that a maker of a promissory note could not set up the defence of usury in a transaction to which he was a stranger. The case of *Wright v. Bundy*, 11 Ind. 398, decides, that when a debtor does not set up the defence of usury, a third person can not without the debtor's consent. *Borum v. Fouts*, 15 Ind. 50, decides the same question in like manner. We are aware that the latter case, as to what constitutes usury, has been modified by *Newkirk v. Burson*, 28 Ind. 435, but as to the point before us, it is not impaired. The ruling in *Stein v. Indianapolis, etc., Association*, 18 Ind. 237, is in harmony with *Stephens v. Muir* and *Conwell v. Pumphrey, supra*. In *Butler v. Myer*, 17 Ind. 77, and in *Cole v. Bansemer*, 26 Ind. 94, it is held, that the creditor of a usurious borrower may take advantage of the usury without his permission, as his representative might, for the purpose of protecting his own rights. With these authorities before us, and some research amongst other decisions, we think it must be held, as the settled law of this State, that no person can take advantage of usury in a loan of money, as a defence against its payment, except the borrower or some one authorized by him to make such defence, or his heir, his representative, or creditor. This rule, it seems to us, is decisive of the case before us. Mrs. Huffman was not the borrower; she was not authorized by the borrower to make the defence of usury; she is not his heir, his representative, nor his creditor. In truth, she is a stranger to the transaction. She purchased the land with notice of the mortgage, took the conveyance with covenants of warranty and against incumbrances, without fraud, and, as far as appears, with-

Studabaker et al., Ex'rs, v. Marquardt et al.

out any knowledge, at the time, of the usury in the loan to Daniels, and enjoys just what she purchased. We see nothing of which she can legally complain. If the doctrine contended for by the appellees were to prevail, it would simply transfer the usury, from the pocket of the usurer, to the credit of one who has no interest in it whatever. This would neither redress the wrong, assert the right, nor subserve justice in any way. Neither the borrower nor any one interested in the transaction would be benefited thereby. Though the gain of the usurer may be ill gotten, the law will not take it from him, merely to give it to some one who has no right to it at all. We think the rule we have laid down is founded in justice, supported by reason, fortified by authority and approved by experience, and that the court below erred. *Price v. Pollock*, 47 Ind. 362.

The judgment is reversed, with costs. Cause remanded, with instructions to sustain the motion for judgment for the sum of eight hundred and thirteen dollars and eighty cents, with interest from the 1st day of February, 1871, and costs of suit.

PETTIT, J., dissents.

ON PETITION FOR A REHEARING.

BIDDLE, J.,—The counsel for the appellees has presented us with an elaborate petition and brief for a rehearing, upon a question which he scarcely mooted in his original argument. We suggest that it would have been better if the counsel had brought his labor and his learning to the case, before it had been submitted.

After combating the opinion delivered in this case, and the authorities upon which it rests, running from 8 Ind. to the present time, as being contrary to all precedent, he fails to cite a single case in conflict with the ruling. He cites several cases from other States, wherein usurious contracts have been declared void directly by statute, or

Cravens *et al.* v. Duncan.

held void by the courts as being against a statute, and therefore can not be enforced against any person, whether party, privy or stranger; but that is not the case we are considering. In this State, usurious contracts are not void; they are only voidable *pro tanto*, and can be defended against only by the borrower, his representative, or a creditor. A stranger cannot interfere between the borrower and usurer, merely to defeat the contract; nor a speculator, for the purpose of saving the usury to put in his own pocket. Such a rule would simply rob the borrower and usurer alike, and give the usury to a third person; and this would be precisely the effect of the doctrine contended for by the petitioner. The rule adopted in the opinion in this case has been the law of this State, supported by repeated decisions of this court, for nearly a quarter of a century. We shall not depart from it, unless we find far stronger reasons against it than any shown us, even in this able and careful petition for a rehearing.

The petition is overruled.

CRAVENS ET AL. v. DUNCAN.

STATUTE OF LIMITATIONS.—*Exceptions of.—Pleading.—Action to Set Aside Fraudulent Conveyance.—Assignment of Judgment.—Insolvency.—Evidence.—Decedents' Estates.*—The assignee, by parol, of a judgment instituted an action against the administrator of the estate of his deceased judgment debtor, and a third person, to set aside an alleged fraudulent conveyance to the latter, of a tract of land, by such decedent in his lifetime, and to subject the same to execution to satisfy such judgment, alleging also, that such estate was insolvent.

Held, on demurrer, that such action may be brought within six years from the accruing of such cause of action.

Held, also, that where a statute of limitations contains exceptions, if the complaint in an action does not show, affirmatively, that it is not within any of such exceptions, it is not defective on demurrer, under such statute.

55	347
139	555
55	347
140	605
55	347
146	633

Cravens et al. v. Duncan.

Held, also, that a default made by such defendant administrator admitted the alleged assignment of such judgment without further proof.

Held, also, that on the trial of such action, it was competent to introduce in evidence the inventory of such estate, and the tax duplicate of such county, as touching the solvency or insolvency of such estate.

COSTS.—Excessive Damages.—Remittitur.—Supreme Court.—Practice.—Where a recovery has been had for an excessive sum as damages, and, on appeal to the Supreme Court, a remittitur of the excess is entered, such judgment, as to the residue, will be affirmed, but at the costs of the appellee made by the appeal.

From the Ripley Circuit Court.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellants.

H. W. Harrington, for appellee.

PERKINS, J.—On the 26th day of October, 1868, John Mullen recovered a judgment, in the Ripley circuit court, in this State, against Walter Bogot and David H. Kitts, for the sum of four hundred and seven dollars and fifty cents. He assigned that judgment, by parol, to Hardin Duncan. Bogot is insolvent, and Kitts is dead. He died insolvent. Before his decease he conveyed a tract of land to James H. Cravens, who afterwards sold and conveyed the same land to William D. Willson. John Mullen, the assignor of the judgment, is dead, and Jesse D. Skeen is his administrator.

On the 17th day of March, 1874, this suit was commenced by Hardin Duncan, the assignee of Mullen's judgment against Bogot and Kitts, to subject the land conveyed by Kitts to Cravens, and by Cravens to Willson, to the payment of said judgment, assigned as above stated to Duncan, on the ground that said land was conveyed by Kitts to Cravens to defraud his creditors. Cravens, Willson and Jesse D. Skeen, administrator of the estate of Mullen, are made defendants. Skeen made default. Cravens and Willson demurred, severally, to the complaint, and their demurrers were overruled. Answer in general denial. Jury trial. Verdict for the plaintiff. And in answer to this interrogatory, viz.: "What amount

Cravens et al. v. Duncan.

of principal, interest and costs are due the plaintiff upon the judgment rendered in favor of John Mullen, against David H. Kitts and Walter Bogot?" they said, "Five hundred and twenty-seven dollars and seventy-two cents." A motion for a new trial was made and overruled, and judgment rendered for the plaintiff. One of the causes assigned for a new trial was this:

"Because the damages are excessive in this; they are for too much, by one hundred and sixty dollars."

The assignments of error, in this court, are these:

1st. The court erred in overruling the defendants' demurrer to the complaint;

2d. The court erred in overruling the motion for a new trial; and,

3d. The court erred in rendering the judgment set out in the record.

The appellants' counsel insist, in argument, upon four grounds for the reversal of the judgment;

1st. The overruling of the demurrer to the complaint; and,

2d. The overruling of the motion for a new trial.

It is insisted that the court erred in its rulings upon this motion for these reasons, viz.:

The evidence did not sustain the verdict, the court admitted illegal evidence to go to the jury, on the trial, and the damages are excessive.

We will notice, in their order, the grounds for reversal relied upon in argument, by appellant's counsel.

1st. As to the sufficiency of the complaint.

There is no doubt that the cause of action in it is embraced by the clause in the statute declaring that actions "For relief against frauds" shall be brought within six years. 2 R. S. 1876, p. 122. *Musselman v. Kent*, 83 Ind. 452. And it has already been decided that where the complaint in a cause shows that the case is within the statute, and not within any of the exceptions contained in the statute, such complaint is bad on demurrer. We

Cravens et al. v. Duncan.

do not think that the complaint in this case shows that the case is not within any of the exceptions to the statute. It contains no such averment, and the allegations of fact in it are not equivalent to such averment. *Potter v. Smith*, 36 Ind. 231.

2d. As to the motion for a new trial. The point in which the evidence is insufficient to sustain the verdict is, as counsel insists, "that there is no proof that the judgment was ever assigned by Mullen to Duncan." Such is the fact; and we think it is not necessary that there should be. The complaint contained the allegation of such an assignment. Skeen, the administrator upon Mullen's estate, was a defendant, duly served with process, in the suit. He failed to answer,—made default. That default admitted the assignment alleged in the complaint, and the judgment upon the default concludes the party in interest, from hereafter enforcing the judgment, and makes the defendants secure against any such enforcement.

3d. The next reason urged by counsel why the new trial should have been granted is, that the court erroneously admitted in evidence the inventory, made by the administrator, of the estate of Kitts, and the tax duplicate, showing the property assessed to him. We think it was necessary in the cause to show Kitts' insolvency. We think the documents in question were legitimate evidence as tending to prove that fact.

4th. The next and last reason urged why a new trial should have been granted is excessive damages. We have seen that one of the grounds assigned in the motion for a new trial by the appellant was, that the damages assessed by the jury were one hundred and sixty dollars in excess of what they ought to have been.

The counsel for appellees, in his brief, expresses a willingness to remit about one hundred and seventeen dollars. We are not able, satisfactorily to ourselves, to determine the exact sum that should be remitted, but have concluded

Johnson v. Prine.

that it should be one hundred and thirty-seven dollars and eighty-seven cents.

The judgment, on a remittitur being entered by appellee for one hundred and thirty-seven dollars and eighty-seven cents, is affirmed, with costs. Otherwise, the judgment will be reversed, with costs, and cause remanded for a new trial.

Since the above was written, the appellee has remitted, in open court, one hundred and thirty-seven dollars and eighty-seven cents, and the judgment below is affirmed, at the costs of the appellee, as and for a judgment for three hundred and eighty-nine dollars and sixty cents.

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130 106

JOHNSON v. PRINE.

JUDGMENT.—*Appraisement.*—*Waiver.*—*Supreme Court.*—*Practice.*—In an action upon a promissory note, not containing any waiver of relief from valuation laws, judgment without such relief should not be rendered; but if the defendant appear to the action and allow such judgment to be rendered without objecting, he can not raise such question, for the first time, in the Supreme Court, on appeal.

From the Grant Circuit Court.

G. W. Harvey and *J. Brownlee*, for appellant.

I. Van Devanter, *J. F. McDowell* and *D. V. Burns*, for appellee.

BIDDLE, J.—Prine sued Johnson on a promissory note, which did not waive the benefit of the appraisement laws. Answer; reply; trial by the court; finding for Prine; motion for a new trial; overruled; exceptions; judgment; appeal.

The court rendered judgment in favor of Prine, for the amount found due, "and that he have execution without relief from valuation laws of Indiana." This was erro-

Long et al. v. Dixon et al.

neous; but as the evidence is not before us, and as Johnson did not object to the form of the judgment, and did not reserve any exceptions to its rendition, nor ask relief below, he can not present the question here. *Smith v. Dodds*, 35 Ind. 452; *Atkisson v. Martin*, 39 Ind. 242; *Lewis v. Edwards*, 44 Ind. 333.

This is the only question discussed in the appellant's brief.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

LONG ET AL. v. DIXON ET AL.

MARRIED WOMAN.—Coverture.—Pleading.—If, in an action against a married woman, upon a contract made by her, the complaint does not affirmatively show that such coverture existed at the time of making such contract, to avail herself of such disability as a defence she must plead it.

SAME.—In an action against a married woman and another to recover for the purchase-money of a tract of land sold to her codefendant, and, at his request, conveyed to her, an averment in the complaint that such conveyance "was made to said defendant," naming her, "wife of," etc., is not available to her on demurrer, as showing coverture.

SAME.—Parties.—In such action she is a proper party defendant, and to avail herself of her coverture to avoid a personal judgment on her implied contract to pay for such land, she must plead it.

SUPREME COURT.—Bill of Exceptions.—Record.—Where time beyond the term is not given by the court to file a bill of exceptions, it forms no part of the record on appeal to the Supreme Court.

From the Greene Circuit Court.

A. G. Cavens, E. H. C. Cavens, D. W. Soliday, R. R. Taylor, J. S. Bays, C. Ballenger and D. M. Bradbury, for appellants.

H. Burns, for appellees.

BIDDLE, J.—Complaint by appellees against appellants, in four paragraphs. The first is a special paragraph to

Long et al. v. Dixon et al.

recover the purchase-money for one-fifteenth, undivided part of certain lands, sold and conveyed. The second is similar to the first. The third is in the form of a common count for five hundred walnut trees. The fourth is a common count for the sale and conveyance of the same lands described in the first count. Demurrers were sustained to the second and third paragraphs, but no question arising upon either of these is brought here. Demurrers, for a defect of parties defendants, and for want of sufficient facts alleged, were overruled to the first paragraph, and exceptions reserved. And, by a general denial to the first and fourth paragraphs, the issues were joined. Trial by the court. Finding for appellee, and, over a motion for a new trial and exceptions, judgment on the finding.

The case was tried at the March term of the Greene circuit court, 1874, and causes for a new trial filed, motion made and overruled at the same time. No time was given, as far as the record shows, to prepare and file a bill of exceptions. On the 12th day of May, 1874, a bill of exceptions was filed. This date must have been at the next term of the court, and, therefore, too late. The bill of exceptions is no part of the record. For the times of holding the Greene circuit court, see section 54, 1 R. S. 1876, p. 385. *Krutz v. Craig*, 53 Ind. 561.

The appellants insist, that the demurrer to the first paragraph of complaint, by Delia Long, should have been sustained because it shows upon its face that she was a married woman at the time the land was sold, and therefore not liable on the implied contract for the purchase-money. We do not think there is any such a direct traversable averment in the complaint. It alleges a sale of the land to Ichabod T. Williams and Edward M. Long, and "that by request of said defendants, the deed was made to said defendant, Delia Long, wife of said Edward." There is no averment that Delia was the wife of Edward

Whitehall v. Conner.

at the time the sale was made. Besides, the land being liable for the purchase-money, Delia was properly made a party defendant to protect her rights in the land; and being properly made a party, the demurrer was correctly overruled. If she did not wish to suffer a personal judgment, she should have set up her coverture by way of answer; and, not having done so, the judgment against her is valid. We have frequently decided, that where a married woman—the complaint not showing the coverture at the time the contract is made—does not set up her coverture against the action, she can not avail herself of it against the judgment. *Landers v. Douglas*, 46 Ind. 522; *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300.

This record shows two paragraphs of complaint, upon which the trial was had, either of which will support the finding and judgment of the court; and as the evidence is not before us, the judgment is affirmed, with costs.

WHITEHALL v. CONNER.

CONVEYANCE.—*Warranty by Separate Instrument.—Guaranty.*—Where, in addition to his deed conveying real estate, the grantor also executes to the grantee a separate instrument, agreeing therein, that if the realty so conveyed is not worth a sum equal to the consideration expressed in such deed, he “will make it worth” such sum, such instrument constitutes, not a guaranty, but, a warranty of the value of such realty.

SAME.—*Breach.*—If such instrument be executed upon the same consideration as such deed, the grantor will be liable for a breach thereof.

SAME.—*Evidence.—Practice.*—Upon the trial of an action upon such warranty, for a breach thereof, where the defence relied upon is, that it was executed without consideration, after the completion of such sale and not as part of the transaction, and the defendant so testifies, the plaintiff may then introduce evidence of declarations of the defendant, made to the plaintiff prior to such sale, as to the value of the land conveyed by him, and of his intention to execute such warranty.

Whitehall v. Conner.

SUPREME COURT.—*Practice.—Weight of Evidence.*—The Supreme Court, on appeal, will not disturb the finding or verdict below, upon the mere weight of evidence.

From the Warren Circuit Court.

W. H. Mallory and J. McCabe, for appellant.

R. W. Claypool and H. M. Billings, for appellee.

PERKINS, J.—Suit upon the following instrument:

“This is to certify that A. L. Whitehall, party of the first part, and William Conner, party of the second part, all of Fountain county, State of Indiana,—the said A. L. Whitehall will make said Conner safe in the sum of four hundred and fifty dollars in a deed of land conveyed by him and others to said Conner, said land being and lying in the county of Adair and State of Iowa. In case said land is not, at this time, worth the above named sum, the said A. L. Whitehall will make it worth the above named sum.
A. L. WHITEHALL.”

“March 24th, 1858.”

The complaint alleges, “that, on the 24th day of March, 1858, the appellee, Conner, purchased of the appellant, Whitehall, for the sum of four hundred and fifty dollars, the south half of the south-west quarter of section twelve, township seventy-four, range thirty-two, in Adair county, Iowa; that appellant caused said land to be conveyed to the appellee, by deed from himself and others; that appellee was ignorant of the quality and value of the land; that appellant, to induce the appellee to purchase it, contracted with him, that if the land was not, at that time, worth four hundred and fifty dollars, he would make it worth that sum to him, and gave him the written instrument sued on, as evidence of said contract, a copy of which contract is made part hereof; that appellee relied upon and was induced by said contract to purchase the land; and he avers that the land was not worth four hundred and fifty dollars, and not more than one hundred dollars; that appellant has not, although often requested

Whitehall v. Conner.

so to do, kept his said contract, but has broken the same, to the damage," etc.

No demurrer was filed to the complaint.

Answer, that the contract was executed without consideration, in this, to wit: The deed mentioned in the complaint and contract, for the south half of the south-west quarter of section twelve, township seventy-four, range thirty-two, in Adair county, Iowa, was executed to appellee on the 24th day of March, 1858, and the payment for the same made by appellee, in full, on or before said 24th day of March, 1858. And appellant further averred the truth to be, that said writing was actually executed on the 27th day of March, 1858, and that the same was not given in pursuance of any previous agreement, but was purely voluntary.

Reply in denial.

Trial by jury. Verdict for appellee for three hundred and nine dollars and forty-four cents. Motion for a new trial overruled. Judgment, and appeal to this court. The evidence is in the record.

The appellee introduced the contract sued on. Also the deed from the appellant, Whitehall, and others, to the appellee, for the Iowa lands. Thereupon, Conner, the appellee, was sworn, and testified that said deed covered the Iowa land in question; was executed about the 24th day of March, 1858; that he had never seen said land; that he paid for it in real estate, at cash price; that he received the deed and the contract of guaranty on the 27th day of March, 1858, at McPharren's office, from McPharren; that they were written and signed on the 24th day of March, 1858; that he called on the appellee and demanded the fulfilment of his contract of guaranty; that about two years afterward he saw him again; that he talked favorably, except the last time, about four years ago; did not refuse then; can not say he understood him.

On cross-examination, he said the deed and contract

Whitehall v. Conner.

were delivered to him by McPherran, at Rob Roy, on the 27th day of March, 1858, in the morning; Mr. Mallory, defendant's attorney, rode out with witness, from Attica, on the day of the commissioner's sale, and stopped at McPherran's office, where the latter gave him the deed and guaranty in Mallory's presence.

The deposition of I. K. Valentine was next read in evidence:—Was an Iowa real estate agent, in Adair county, since 1856; is acquainted with the land described in the deed; is second and third rate land; no improvements on it in 1858; is about two hundred miles from any railroad, and one hundred from any navigable stream; was not worth more than one dollar and a quarter per acre; witness would not have given that.

The deposition of John Shreves followed:—Was acquainted with the value of unimproved land in Adair county, Iowa, in 1857 and 1858. The value of that described in the deed of Whitehall to Conner did not exceed three dollars an acre.

Robert Ewing, a witness, testified that he resided, in 1857 and 1858, in Adair county, Iowa; was acquainted with the value of unimproved land in that county in those years; was acquainted with the value of the land described in Whitehall's deed; was of the value of from two dollars to two dollars and a half an acre.

The appellee then offered to testify; "That in the negotiations for the trade between the parties, about a week before the date of the deed, the defendant said he would guarantee the Iowa land was worth four hundred and fifty dollars, and would give it to him in black and white."

The appellant objected, and the court refused to allow the testimony to go to the jury.

The evidence of the appellant was then given to the jury.

Whitehall, the appellant, testified, that his deed to Conner, for the Iowa land, was acknowledged on the 24th

Whitehall v. Conner.

of March, 1858, at McPherren's office, in Rob Roy, and he, witness, on that same day, delivered it to Conner, the grantee, at his, witness,' house; and, on the same day, delivered to him a horse and pair of mules, at the old Van-Grundy farm, south of Rob Roy, where witness then lived. They were delivered on the trade. The contract on which the suit is brought was in the hand-writing of witness; it was written and signed on the 27th day of March, at the widow Conner's house, at the place and day of sale of the Conner land, and was delivered to appellee, Conner, on that day; there was no consideration for the written guaranty. Witness did not receive anything for giving it; did not give it to appellee in pursuance of any previous agreement; witness had bought of appellee three shares in the Conner lands, which were to be sold on the 27th day of March, 1858, by James Marquis, as commissioner; witness had paid him in full for the shares, before that day, in personal property and in the Iowa land deeded to him on the 24th day of March. Appellee came to the place of sale on horseback, on a horse witness had delivered to him on the trade, on the 24th of March. Mr. Mallory did not come with him; he came up from Covington, in the stage or hack. Appellee, Conner, was blustering at the place of sale in a violent manner, complaining that the horse he had received of witness on the trade was lame; an examination was had, and he became satisfied with the horse. He then complained about the land; said he did not believe it was worth as much as represented to be; appellee had agreed, in the trade, to give witness an order on the commissioner for the money for the shares in the place he had sold him; witness was afraid he would fly from his contract, and, to pacify him, witness wrote and gave him the instrument sued on; he did not then claim that witness had agreed to give such a guaranty.

On cross-examination, witness said:

Could not say upon what day the instrument of assign-

Whitehall v. Conner.

ment of shares in land, heretofore mentioned, was executed. It bore date, as appeared on examination, the 27th of March, 1858.

Pugh, Mallory and others confirmed the testimony, in part, of Whitehall.

Testimony was produced by the appellant, tending to show that the Iowa land was worth five dollars an acre and upwards.

Appellee, in rebutting, introduced witnesses who were permitted, over appellant's objection, to testify that appellant Whitehall did, before the trade for the Iowa land was accomplished, verbally assure Conner that said land was worth four hundred and fifty dollars, and that he would give it to him in black and white. This testimony was objected to as not rebutting any of appellant's evidence. Appellant had testified thus:

"There was no consideration for the written guaranty; I did not receive anything for giving it; did not give it to appellee in pursuance of any previous agreement."

And thus:

That at the time he gave appellee the written guaranty, the latter "did not claim that witness had agreed to give such a guaranty."

We think the evidence was rebutting and properly admitted.

On the weight of evidence, we can not disturb the finding and judgment below. We may here remark, that if the written instrument, improperly called a guaranty,—it being, in fact, in legal effect, if executed upon a consideration, a warranty that the Iowa land was worth four hundred and fifty dollars, and an agreement to make up the deficiency if it was not,—if this instrument evidences an agreement which was a part of the original transaction, and of the consideration on which the Iowa land was taken in the trade, the appellant may be liable upon it. Presumptively, it does. It bears the same date with the deed to the land, indicating the simultaneous execution

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

of the two instruments; but if it be shown that it was, in fact, executed afterwards, the facts that it was not dated the day of its execution, but antedated, so as to make its date correspond with that of the deed,—these facts, we say, would tend to prove that the agreement to give it was a part of the same transaction in which the deed was executed, and that it was antedated in order that it might express the fact.

As the only assignment of error is, that the court erred in refusing a new trial, and the only grounds urged in support of it are, the admission of the rebutting testimony above mentioned, and that the finding was not supported by the evidence, we need extend this opinion no further.

The judgment is affirmed, with costs.

MOORE, ADM'R, v. THE STATE, EX REL. DENNY, ATT'Y GEN'L.

OFFICER.—Duty.—Public Funds.—Demand.—Where by law it is made the duty of a public officer, at stated times and to certain other officers, to report and pay over certain funds officially received by him, upon his failure so to do, a right of action thereby accrues against him, without demand.

SAME.—County Clerk.—Unclaimed Moneys—If the clerk of the circuit court of any county fail, at the times prescribed by law, to account for and pay over all unclaimed docket, witness and jury fees, fines and moneys of estates, which by law he is at such times required to so account for and pay over, he thereby becomes liable, without demand, to an action therefor.

SAME.—Action Against.—Statute of Limitations.—Upon the institution of a suit against such clerk to recover any of such funds which he has failed to so account for and pay over, he may avail himself of the statute of limitations, as a defence; and an answer by him, averring that the right of action therefor accrued more than six years prior to the commencement of such action, is sufficient.

SAME.—Attorney General.—The Attorney General is the proper relator, on behalf of the State, to bring such action.

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

REPEAL OF LAWS.—Attorney General.—Auditor of State.—County Superintendent.—Section 9 of the supplemental act of March 10th, 1873, (1 R. S. 1876, p. 151,) in relation to the election, duties, etc., of the Attorney General, is in conflict with and repeals so much of clauses 6 and 7 of section 2 of the act of May 27th, 1852, (1 R. S. 1876, p. 156,) prescribing the powers and duties of the Auditor of State, and so much of section 7 of the supplemental act of March 8th, 1873, (1 R. S. 1876, p. 816,) as authorize, respectively, the Auditor of State and county superintendents to institute suits for the collection of unclaimed witness, court and docket fees, fines, forfeitures and moneys of estates.

SUPREME COURT.—Practice.—Motion to Strike Out Part of Pleading.—Error in overruling a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court.

QUERY.—Is a demand necessary before bringing such suit against such clerk, for the amount of forfeitures collected by him?

From the Decatur Circuit Court.

W. A. Moore and J. D. Miller, for appellant.

C. A. Buskirk, Attorney General, for the State.

BIDDLE, J.—The relator, James C. Denny, as Attorney General of Indiana, on the 23d day of January, 1874, filed in the Decatur circuit court the following complaint, to wit:

“The State of Indiana, on the relation of James C. Denny, Attorney General of said State, complains of William A. Moore, administrator of the estate of James Gavin, late of said county of Decatur, deceased, and says, that heretofore, to wit, on the 1st day of November, 1863, the said James Gavin, deceased, was elected, qualified and entered upon the discharge of his duties as clerk of the circuit and common pleas courts, of Decatur county, in said State, and continued so to act, as such clerk, until the 14th day of June, 1864; and that heretofore, to wit, on the 31st day of October, 1864, the said James Gavin, deceased, was again elected, qualified and entered upon the discharge of his duties as clerk of said circuit and common pleas courts of said Decatur county, in said State, and continued to act as such clerk until the 30th day of January, 1867.

“That while he so acted as such clerk, he received and

Moore, Adm'r, v. The State, ex rel. Denny, Att'y Gen'l.

had in his possession a large sum of money, to wit, the sum of two thousand two hundred and six and $\frac{32}{100}$ dollars.

“\$112.00 of said amount being for docket fees of the circuit court; \$164.00 of said amount being docket fees of the common pleas court; \$76.50 of said amount being for jury fees of said circuit and common pleas courts; \$233.00 of said amount being for fines; \$771.07 of said amount being for forfeitures; \$269.37 of said amount being for unclaimed witness fees; and \$580.88 of said amount being for unclaimed balances in estates. That all of said amounts have remained in the hands of the defendant herein for more than two years last past, and have never been demanded by the persons entitled to receive the same, except as hereinafter stated, and that no demand was ever made by the State, or any officer acting for the State, until the 19th day of January, 1874, when the relator herein, for and on behalf of the State, demanded the same, and then and there requested the said defendant to pay the said sums of money, to do which the defendant then and there failed, neglected and refused. That on the 4th day of July, 1873, the said James Gavin departed this life, and that on the 25th day of July, 1873, the said William A. Moore was appointed and duly qualified as the administrator of the estate of said James Gavin, deceased, and is at this time acting as such administrator. That under the provisions of the statute, all said sums of money should have been paid to the relator herein. That there is now due, in the estate, on account of the money so collected by the said Gavin, deceased, the said sum of two thousand two hundred and six and $\frac{32}{100}$ dollars, with interest thereon. And the relator further says and charges the facts to be, that the said decedent, James Gavin, failed to keep said moneys separate from his own moneys, but used the same and speculated with the same; whereby, the relator says that the said James Gavin made large profits off of said moneys, to wit, two thousand dollars, and became liable to pay interest

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

for the use of said moneys, now amounting to the sum of fifteen hundred dollars. Wherefore plaintiff demands judgment for three thousand five hundred dollars.

"JAMES C. DENNY,

"Attorney General for Indiana.

"State of Indiana, County of Marion, ss.

"Before the undersigned personally came James G. Miles, assistant Attorney General, of Decatur county, Indiana, appointed as such by James C. Denny, Attorney General, and, being by me first duly sworn, says that the claim of the plaintiff alone [above] set out is just and due, and wholly unpaid, as he verily believes; that he knows of no legal set-off or counter-claim thereto, and that the plaintiff ought to recover thereon the said sums so set out as above, with interest thereon, to wit:

"Docket fees of circuit court	\$112 00
"Docket fees of common pleas	164 00
"Jury fees, both courts	76 50
"Fines	233 00
"Forfeitures	771 07
"Unclaimed witness fees	269 37
"Unclaimed money in estates	580 88
"Interest above set out	1,500 00

"JAMES G. MILES.

"Subscribed and sworn to before me, a notary public in and for said county, this 20th day of January, A. D. 1874.

"Witness my hand and notarial seal.

"CALEB S. DENNY,

[SEAL.]

"Notary Public."

The appellant filed first a motion to strike out separately, severally and distributively the words and figures of the complaint set forth in italics above, which motion was overruled and excepted to.

A demurrer was then filed to the complaint and claim, assigning the following reasons:

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

"1st. Because the said James C. Denny, Attorney General, is not the proper relator; and,

"2d. Because they do not, or either of them, state facts sufficient to constitute a cause of action."

Which demurrer was overruled, and exception taken.

The appellant then answered in nine paragraphs.

The first was a general denial. The second, the six years' statute of limitations answered to the whole complaint. The other paragraphs were the six years' statute of limitations, pleaded separately to each of the items in the complaint and claim set forth.

A demurrer to these answers, except the general denial, was filed and sustained, and an exception reserved.

The cause was then submitted to the court for trial, upon the following agreed statement of facts:

"It is agreed for the purpose of this trial that the following is a correct statement of the facts involved in this suit:

"That the said James Gavin was elected clerk of Decatur county, Indiana, and was duly qualified, and entered on the discharge of his duties, as such, on the 1st day of November, 1863, and continued to act as such until the 14th day of June, 1864. That on the 31st day of October, 1864, he was again elected, qualified and entered on the discharge of his duties as clerk of the circuit and common pleas courts of said county, and continued to act as such until the 30th day of January, 1867.

"That the records, fee books and judgment dockets belonging to the clerk's office of said county, show that said James Gavin, as clerk, during the term he continued in office, as aforesaid, received the various sums of money hereinafter set out, between the 1st day of November, 1863, and the 30th day of January, 1867, and all of said sums were received by him, and receipted for on the proper fee books and records of said office, and have remained continuously open to public inspection in said office, ever since.

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

"That the following sums, so received by the said James Gavin, during his continuance in office, were used by him, mixed with and used as his own moneys, and were not kept separate as public moneys, in a separate fund, to wit:

"Docket fees of circuit court	\$112 00
"Docket fees of common pleas court	164 00
"Jury fees, both courts	76 50
"Fines	233 00
"Forfeitures	771 07
"Unclaimed witness fees	269 37
"Unclaimed money in estates	580 88

"And that said moneys have been collected, and remained in the hands of said Gavin, for the average time of ten years.

"That the said James Gavin did not make the reports required of him by law, as such clerk, in regard to said fees, and said funds have never been paid over by the said James Gavin, or by his administrator, or by any other person in his behalf, as the law requires. And it is further agreed that said sums, with interest, were demanded of William A. Moore, administrator of the estate of the said James Gavin, on the 19th day of January, 1874, previous to the filing of the claim in this cause.

"Signed and dated this December 3d, 1874.

"C. A. BUSKIRK,

"Attorney General of Indiana,

"By J. G. MILES, Assistant.

"W. A. MOORE,

"Administrator of the estate of James Gavin, deceased."

Which was all the evidence given in said cause, and upon which the court found for the State, and assessed the damages at the sum of two thousand three hundred and twenty-five dollars and twenty-two cents.

A motion for a new trial was filed, assigning as reasons:

"1st. Because the finding of the court is not sustained by the evidence;

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

"2d. Because the court erred in assessing excessive damages; and,

"3d. Because the finding of the court is excessive in amount."

The motion for a new trial was overruled, and an exception reserved, and judgment rendered on the finding.

Each of these rulings of the court are assigned as error, in this court, in the order above set forth.

First. It is urged upon us by the appellant, as ground for reversing the judgment, that the suit is not properly brought upon the relation of the Attorney General; that prior to the passage of the act of March 10th, 1873, (1 R. S. 1876, p. 151, sec. 9,) the suit could have been brought only in the name of the Auditor of State, (1 R. S. 1876, p. 156, sec. 2, 6th and 7th clauses,) which act, it is contended, is not repealed in this respect by the act of March 10th, 1873. The 6th and 7th clauses of the prior act are as follows:

That the Auditor of State shall,

"*Sixth.* Institute and prosecute, in the name of the State, all proper suits for the recovery of any debts, moneys or property of the State, or for the ascertainment of any right or liability concerning the same.

"*Seventh.* Direct and superintend the collection of all moneys due to the State, and employ counsel to prosecute suits instituted at his instance, on behalf of the State."

Section 9 of the act under which this suit is brought, is as follows:

"Sec. 9. It shall be the further duty of the Attorney General to ascertain from time to time the amounts paid to any public officer of the State, or any county officer, or other person, for unclaimed witness fees, court docket fees, license, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source where the same is by any law required to be paid to the State, or any officer in trust for the State; and in all cases

Moore, Adm'r, v. The State, ex rel. Denny, Att'y Gen'l.

where the officers whose duty it shall be to collect the same shall fail, neglect or refuse for twelve months after the cause of action in favor of the State shall have accrued, or shall fail, neglect or refuse to sue for and proceed to recover any property belonging to or which may escheat to the State, the said Attorney General shall institute or cause to be instituted and prosecuted all necessary proceedings to compel the payment of or recovery of any such property."

It is apparent that, as to the officer who shall institute suits on behalf of the State, section 9 of the latter act, in reference to the matters herein mentioned, is in conflict with the 6th and 7th clauses of section 2 in the former act; so far, therefore, the former act must be held as repealed. And by section 7 of the act of March 8th, 1873, the county superintendent of common schools was the proper officer to institute such actions to recover several of the various funds claimed in this suit. (1 R. S. 1876, p. 816.) But section 9, *supra*, is the last expression of the legislative will, and therefore must control. The conclusion follows, that the suit is properly brought in the name of the State, on the relation of the Attorney General. In the cases of *The State, ex rel., etc., v. Temple*, 50 Ind. 585, and *The State, ex rel., etc., v. Giles*, 52 Ind. 356, which were similar to this case, and brought under the authority of the same section, the right of the Attorney General as relator was not questioned.

As to the various motions made to strike out certain parts of the complaint, we have frequently decided that the overruling of a motion to strike out portions of a pleading constituted no available error in this court. And we think the demurrer to the complaint was properly overruled. It is good, at least, for money had and received.

In deciding the questions arising upon the demurrers to the several answers setting up the statute of limitations,

Moore, Adm'r, v. The State, *ex rel.* Denny, Att'y Gen'l.

we must first ascertain the nature of the cause of action sued upon.

We think there is nothing in the relation of the duties devolving on the clerk of the court to the funds sought to be recovered against his administrator, which will prevent the statute of limitations from running in his favor; and, by express enactment, it runs against the State of Indiana as against persons. 2 R. S. 1876, p. 129, sec. 224.

It is the duty of the clerk of a circuit court, or court of common pleas, within thirty days after the collection of the same, to pay to the treasurer of his county all docket fees received by him, on account of the business of said court. 1 R. S. 1876, p. 776, sec. 6.

And it is the duty of such clerk, on the 1st day of January of each year, to make out and file with the treasurer of the county a complete list of all fines, jury fees, and witness fees which have remained unclaimed for one year, and to pay to such treasurer, upon the receipt thereof, all moneys so collected. 2 R. S. 1876, p. 17, sec. 7.

Upon the receipt of the purchase-money arising from the sale of real estate, where there are no heirs to claim it, it is the duty of the clerk to pay the same to the treasurer of the county. 2 R. S. 1876, p. 544, sec. 142.

In the collection of these several funds by the clerk of a court, when the time at which he should pay them over, and the person or officer to whom they should be paid are fixed by law, and therefore certain, we think, upon failure to so pay them, he becomes at once liable, without demand and refusal before suit is brought; and against an action founded merely upon his breach of duty in not so paying over such funds, he may plead the statute of limitations.

In reference to forfeitures, we have not been able to find any statute, nor has either of the parties cited us to any, requiring a clerk of the court to pay over moneys arising thereon, in any different manner from the general duty imposed upon him in reference to moneys officially

Falkner v. The Ohio and Mississippi Railway Company.

received. If no such statute exists, perhaps he could not be sued for breach of such duty, before demand made; but we do not so decide, because it is not necessary to the disposition of the case.

If we are right in these views, it follows that the court erred in sustaining the demurrers to the several paragraphs of answer which plead the statute of limitations.

The judgment is reversed, with costs. Cause remanded, with instructions to overrule the demurrers to the several paragraphs of answer, which set up the statute of limitations, and for further proceedings.

FALKNER v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

RAILROAD.—*Regulations of.—Passengers on Freight Trains.*—Where due notice thereof is given and the necessary means for complying therewith is provided, a railroad company has the right to adopt a regulation prohibiting the conductors of its freight trains from carrying passengers thereon, who shall not have previously procured a specified kind of ticket.

SAME.—*Ejecting Passengers.*—Where a passenger having notice of and neglecting to comply with such regulation is ejected from such train by the conductor thereof, by the use of no more force than is necessary, he cannot maintain an action therefor.

From the Jennings Circuit Court.

E. P. Ferris and *J. Bundy*, for appellant.

C. A. Beecher and *E. C. Devore*, for appellee.

BIDDLE, J.—The complaint of the appellant, against the appellee, in this case, avers, that he entered the car of a freight train belonging to the appellee, as a passenger, and tendered the fare to the conductor, who refused to receive it, but stopped the train and ejected the appellant from the car.

Falkner v. The Ohio and Mississippi Railway Company.

The complaint contains three paragraphs, but they are not different in legal effect. No question is made upon the complaint.

The appellee answered,

1st. The general denial; and,

2d. As follows:

That, at the time and before the occasion complained of, the appellee kept constantly equipped and furnished a great number of passenger cars and passenger trains, to accommodate persons who desired to travel on said road, expressly devoted to carrying passengers, which trains ran daily both ways along the road the appellant desired to travel upon, as described in the complaint; and also, at said time and place, were so running cars and trains, calculated and set apart for carrying freight especially, and, to a limited extent, under certain rules and regulations, carried passengers on said freight trains. By said rules and regulations, the conductors were prohibited from carrying passengers on said freight trains, unless they were provided with a freight train order, a round trip ticket, a thousand-mile ticket or a pass, before getting on said trains; that the appellant neglected to provide himself with a freight train order, a round trip ticket, a thousand mile ticket or a pass, before getting on the train, although the same were kept for sale, at all hours, at the defendant's depot and office, at said place; that said rules and regulations were, at said time, conspicuously printed and posted up at the appellee's said depot and office, at said place, and at all ticket, passenger and freight stations on their said road, and, by the terms of said regulations, the agents and conductors of said company were required to see them strictly enforced; that the appellant made no effort whatever to purchase a freight train order, round trip ticket or thousand-mile ticket, before getting on said train, and had no pass; but, in defiance of said regulations, went upon said freight train, at said place, and demanded to be taken thereon to said Brownstown, without

Falkner v. The Ohio and Mississippi Railway Company.

having provided himself with either of said requisites; and thereupon the conductor stopped said train and put the appellant off of the same, using no more force nor compulsion than was reasonably necessary. Wherefore, etc.

This paragraph is more full than we have stated it, as to the description of the road, the point the appellant got on the train, his destination, depots, stations, etc., but the above are the substantial facts averred.

A demurrer to this paragraph, alleging a want of sufficient facts, as ground, was overruled, and exceptions reserved by the appellant. The case was then tried by a jury, resulting in a verdict and judgment for the appellee; but no question arising at the trial has been reserved.

The only assignment of error is, overruling the demurrer to the second paragraph of the answer.

Railroad companies do not, as a general rule, hold out their freight trains to the public as means of carrying passengers. The construction of the cars, the inconvenience of their means of entrance and exit, their want of seats for passengers, their various appliances and their general appearance forbid such a presumption. A passenger, as a general rule, has no right to take passage on a freight train. He must know, from their general appearance and the structure of the cars, that they are not adapted to receive passengers for travel. If the company, in exceptional cases, carry passengers, the passenger must inform himself accordingly, and comply with its terms. He has not the same right to take passage in a freight car, on a freight train, as he has in a passenger car, on a passenger train.

Railroad companies have the right to make reasonable rules and regulations in managing and conducting their trains, and the passengers, when they are reasonable, must comply with them. We think the rules and regulations set out in the answer we are considering,

Gabe v. McGinnis et al.

as applicable to a freight train, are reasonable, and that it was the duty of the appellant to comply with them, if he desired to travel thereon; and if he would not do so, the conductor had the right, and it was his duty under the regulations, to put him off of the train,—using no unnecessary or improper force in doing so.

The following authorities fully sustain these general principles: *The Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441; *The Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141; *The St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566; *The Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Cheney v. The Boston, etc., R. R. Co.*, 11 Met. 121; *Hibbard v. The New York and Erie R. R. Co.*, 15 N. Y. 455; *The Cleveland, etc., R. R. Co. v. Bartram*, 11 Ohio State, 457; *Johnson v. The Concord R. R. Corporation*, 46 N. H. 218; *The Baltimore City, etc., R. R. Co., v. Wilkinson*, 30 Md. 224; *The Chicago, etc., R. R. Co. v. Randolph*, 53 Ill. 510; *Dietrich v. The Pennsylvania R. W. Co.*, 71 Pa. State, 432.

The judgment is affirmed, with costs.

GABE v. MCGINNIS ET AL.

PROMISSORY NOTE.—*Action by Assignee Against Maker.—Defence.—Pleading.—Can not be Double.*—To the complaint by the assignee, against the makers, of a promissory note not governed by the law merchant, the defendants, “for answer, and by way of cross-bill,” admitted the execution of such note in the character of principal and surety, but alleged, that it was executed to the payee, for a balance due upon a former promissory note held by such payee against such defendant principal, only, and merely for convenience in making credits thereon, as no space for that purpose remained upon the former note; that such former note was executed for a balance supposed to be due to such payee upon the dissolution of a business partnership theretofore existing between such payee and principal, but, inasmuch as such supposed balance was shown by a state-

Gabe v. McGinnis et al.

ment of such business prepared by such payee, only, and without an opportunity by such principal to ascertain its correctness, he had executed it solely at the solicitation of the payee and upon his promise to make a full showing as to such statement and correct any mistakes, omissions or overcharges therein, by reducing the amount of said note; that such payee had failed and refused to make such showing; that he had made overcharges and omissions, as to certain matters, specified, in various sums, aggregating more than the amount of the note in suit, and for which the principal was entitled to relief; and such pleading prayed that such payee be made a party to the action and required to make such showing, and demanded judgment for the excess of such counter-claim over the note in suit.

Held, on demurrer, that such pleading was intended as a counter-claim against such payee.

Held, also, that it did not state facts sufficient to constitute either a counter-claim, as against such payee, or an answer, as against the plaintiff.

Held, also, that such pleading, being intended as a counter-claim against such payee, could not at the same time be an answer against the plaintiff.

From the Monroe Circuit Court.

J. W. Buskirk, J. H. Loudon and H. C. Duncan, for appellant.

Howk, J.—Appellant, as plaintiff, sued the appellees, as defendants, in the court below, upon a promissory note, of which the following is a copy:

“\$583.66.

January 8th, 1871.

“One day after date, we promise to pay to James Small, or order, five hundred and eighty-three and $\frac{66}{100}$ dollars, with interest at ten per cent. per annum, value received, without any relief whatever from valuation or appraisement laws.

(Signed)

“ARCHIBALD MCGINNIS.

“ELIZABETH MCGINNIS.”

And it was alleged in appellant's complaint, that on March 2d, 1874, James Small, the payee of said note, by indorsement in blank thereon, a copy of which indorsement was filed with said complaint, assigned said note to the appellant; that on the — day of —, 1874, said Elizabeth McGinnis died, and appellee Mary Small was administratrix, with the will annexed, of said decedent's estate, and that the said note remained unpaid.

Gabe v. McGinnis *et al.*

And the appellees, "for answer, and by way of cross-bill" in said action, said, in substance, that they executed the note in appellant's complaint mentioned, but that in 1866, the payee of said note, James Small, and appellee Archibald McGinnis entered into partnership in the wagon making business, the said Small undertaking on his part to furnish a shop and smith's tools, the wood-work of wagons, and all other material and capital necessary to carrying on said business, and all iron and steel that might be necessary and proper for said business; that he agreed to charge the firm only the cost and carriage on the same, and said McGinnis was to do the work, and the profits and loss of the partnership were to be mutually enjoyed and borne between them; that said business and partnership were continued and carried on for, to wit, three years, in Bloomington, Monroe county, Indiana, when, by mutual consent, said partnership was dissolved and their accounts on the shop books settled and adjusted, and the total footings of the books of said Small taken, without examination of the items or an opportunity given said Archibald to examine the same, and a balance of — dollars found in favor of said Small; and the said Small pretending that, for the want of time to do so then, if the said McGinnis would execute his note for said sum, he would, without unnecessary delay, make out a copy of the firm account for defendant Archibald, and if any thing was found wrong or overcharged, or improperly charged, that the same should be corrected, and said note promptly corrected; and said appellees said that said Small being a near relation, and standing in nearly the relation to him of an elder brother, he consented to and did do so; and thereafter said Small, from time to time, renewed his promise to settle and adjust said account, but failing to do so, said Archibald has reduced said amount of said —, by credits, to the amount of the note in suit; that for the convenience of entering credits on it, the old one having little or no unwritten surface for that

Gabe v. McGinnis & al.

purpose, he executed the note in suit for the balance then due on it, with his mother, said Elizabeth, as his security; that said Small, though often requested, wholly failed to furnish, in any form or manner, said partnership account, or to afford him any opportunity to ascertain the correctness of the same; that said Small, instead of charging said firm only cost and carriage for the iron and hardware used in their said business, charged the same at cost and carriage and twenty-five per cent. profit, making an overcharge of six hundred dollars; and instead of furnishing to appellee Archibald, as tools, the files and rasps to be used in said business, at his own expense, he charged the same against said firm at retail prices; and furnished, to be used by said partnership, parts, only, of the wood-work of five wagons, promising to furnish the residue in good time for work, and wholly failed and refused to do so until said parts, so furnished, became and were ruined and spoiled and of no value whatever, and wrongfully, unjustly and improperly charged the same against said firm at twenty-five dollars each; that said Small charged the shop rent of their shop, in said account, against said firm, at eight dollars per month, for two years and seven months, when, by the terms of said partnership, it was to have been furnished at his own expense, without charge against said firm; and that appellee Archibald was compelled, since the making of said note in suit, to pay for said firm certain described debts, amounting in all to one hundred and forty-five dollars, for one-half of which said note should be credited; that upon a full settlement of the partnership accounts, there was a balance due appellee McGinnis, and that the true condition of the partnership dealings was unknown to the makers of said note, and to each of them, at the time of its execution; and that the appellees could not, for the want of the books in the possession of said Small, state more particularly so much of their defence as was connected with said books. And appellees prayed that appellant and said Small be made

Gabe v. McGinnis *et al.*

defendants to said "cross-bill," and that said Small be required to answer the same, and to produce in court his account against said firm for the correction and settlement of the same, and after paying said note, that said Archibald have judgment for the residue, and other proper relief.

In the second paragraph of appellees' answer, they alleged payment in full of the note in suit, to the payee of the note, before his assignment thereof to the appellant and before the commencement of this action.

Said James Small appeared and filed a demurrer to appellees' "cross-bill," for the want of sufficient facts therein "to constitute a defence," which demurrer was sustained.

And the appellant, also, demurred to appellees' "cross-bill," for the want of sufficient facts therein "to constitute a defence," which demurrer was overruled, and to this decision appellant excepted.

And the appellant then replied to and answered the appellees' "cross-bill" and answer, in three paragraphs, as follows:

First. A general denial of the "cross-bill" and answer;

Second. For further reply to appellees' first paragraph, or "cross-bill," the appellant said, that he admitted the partnership and the dissolution thereof, between the appellee Archibald McGinnis and said James Small, as alleged in said "cross-bill," and a settlement had between them of their partnership accounts; that upon said settlement of said accounts, a balance of one thousand eight hundred and fifty dollars was found due to said Small; that the matter so remained for some time, and said Small demanded of said Archibald a final settlement, when the latter claimed that some things in said Small's account were too high; that said Small then proposed to deduct one hundred dollars from his account, if said Archibald would settle the remainder by note, and said Archibald accepted this proposition and executed his notes to said Small for one thousand seven hundred and fifty dollars;

Gabe v. McGinnis et al.

that said Archibald had paid off one of said notes, and a considerable amount on the other of said notes, when, on January 8th, 1871, after deducting the payments made on said other note, an unpaid balance of five hundred and eighty-three dollars and sixty-six cents was found due thereon, and said other note was then taken up by said Archibald, and the note in suit was executed for said unpaid balance; that during the settlement of said partnership accounts, said Archibald McGinnis had full and free access to the account books of said James Small, containing his account against said partnership of Small & McGinnis, and said Archibald frequently examined said account, and was well satisfied with said settlement, and with said Small's charges against said firm, and with full knowledge of the same, on the part of said Archibald, said settlement was made; and,

Third. For a further reply to appellees' first paragraph, or "cross-bill," and by way of estoppel, appellant said, that, before he purchased the note in suit from the payee thereof, he called on the appellee Archibald McGinnis, and the appellee Mary Small's decedent, and told them he was about to purchase said note, and would do so, if the note was good and there was no defence thereto; that thereupon, the said Archibald and said decedent informed the appellant that the note was good, that there was no defence thereto, and that it would be paid to him, if he became the purchaser thereof; that appellant, relying upon said representations and statements of said parties, and believing the same to be true, and by reason thereof, purchased said note; and that, at and before his purchase of said note, appellant was wholly ignorant of the matters and things set up in said first paragraph of appellees' answer, and had no knowledge of that or any other defence to said note.

Appellees demurred to the second and third paragraphs of said reply, for the want of sufficient facts therein to

Gabe v. McGinnis et al.

constitute a reply, but it does not appear from the record that this demurrer was ever decided by the court below.

The action was tried by a jury in the court below, and a verdict was returned for the appellant, assessing his damages at the sum of one hundred and sixty dollars and twenty cents, and judgment was entered by the court below, on the verdict of the jury. Upon written causes filed, appellant moved the court below for a new trial, which motion was overruled by the court, and to this decision appellant excepted, and prayed an appeal to this court.

The appellant has assigned, in this court, the following alleged errors:

“1st. In overruling appellant’s demurrer to the first paragraph, or ‘cross-bill,’ of appellees’ answer; and,

“2d. Overruling appellant’s motion for a new trial.”

In considering the first alleged error and the questions thereby presented, it is exceedingly difficult to reconcile the decision of the court below, in overruling appellant’s demurrer to the appellees’ “cross-bill,” with the decision of the same court in sustaining the demurrer of the said James Small to the same “cross-bill.” One or the other of these two decisions, it would seem, must be wrong, and perhaps both were wrong, though the latter proposition is one that is not now in the case. But if the “cross-bill,” as it is termed, counting, as it did, upon an alleged parol agreement of the said James Small, to which agreement the appellant was not a party, did not state facts sufficient to constitute a “cross-bill,” or to entitle the appellees to relief as against said James Small, it is difficult, we might say impossible, for us to conceive, how or why the court below decided that said “cross-bill” did state facts sufficient to constitute a “cross-bill” and to entitle the appellees to relief as against the appellant, who was an utter stranger to said agreement. The appellees have filed no brief in this court in support of the decisions of the court

Gabe v. McGinnis et al.

below, in their favor, and therefore we can only conjecture the grounds of those decisions.

In their so-called "cross-bill," the appellees admitted the execution of the note in suit, for a balance due on a former note, and because the said former note had been so covered over with credits, endorsed thereon, that "little or no unwritten surface for that purpose" remained "for the convenience of entering credits on." And the appellees alleged, that the said former note had been given to the said James Small for a balance which appeared to be due him, growing out of certain copartnership transactions between him and the appellee Archibald McGinnis, and that the said Small then and there agreed, that, if the said McGinnis would execute his note for said balance, he, the said Small, would, without unnecessary delay, make out a copy of their partnership accounts for said Archibald, and, if any thing was found wrong or overcharged or improperly charged, that the same should be corrected, and said former note promptly corrected. This alleged agreement of the said James Small is the foundation of the so-called "cross-bill," and it was alleged therein that there were overcharges and improper charges in the said copartnership accounts, as kept by said Small, to a very large amount,—specifically pointing them out,—and that said Small, although often requested, had wholly failed to keep his said agreement in any particular. There was no averment in the so-called "cross-bill," that the note now in suit was executed in pursuance or upon the faith of the aforesaid or any other agreement of the said James Small; nor was there any averment therein that the appellant had any notice whatever of any existing equities in favor of the appellees, or either of them, against said note, at or before the time the same was endorsed to him. And there was no averment in said "cross-bill," of the insolvency of said James Small, nor was any other reason assigned therein by the appellees for interjecting their

Gabe v. McGinnis et al.

alleged counter-claim against said James Small into the appellant's action against them.

It has been repeatedly decided by this court, that a single pleading can not be permitted, under our code of practice, to perform the double function of an answer and a counter-claim, and that it must be either an answer, or a counter-claim, and that it cannot be both. It seems to us, from the averments of the so-called "cross-bill" in this case, that it was intended by the appellees to be, and was, a counter-claim against the said James Small, the payee of the note in suit. It would seem, indeed, from the demand for relief in said counter-claim, that the appellees wanted the court below to apply the damages they might recover, to the payment of the note in suit, "and, after paying said note, that said Archibald have judgment for the residue." Unless the said cross-bill stated facts sufficient to constitute a valid and legal counter-claim against the said James Small, it is evident, we think, that it would state no cause of counter-claim against the appellant. In other words, the appellees' counter-claim, or "cross-bill," would not constitute a defence to appellant's action, unless it stated facts sufficient to constitute a valid counter-claim against the said James Small.

But the court below decided, and we think correctly, upon the demurrer of said James Small, that the so-called "cross-bill" did not state facts sufficient to entitle the appellees to any relief against said Small. This decision must have been based upon the fact, which is apparent upon the face of said "cross-bill," that the matters stated therein did not constitute a legal counter-claim against said James Small. And in our opinion it follows, logically and legally, from said decision, that the said so-called "cross-bill" did not and could not constitute a valid and legal counter-claim against the appellant.

We hold, therefore, that the court below erred in overruling appellant's demurrer to the so-called "cross-bill" of the appellees.

Richardson, Adm'r, *et al.* v. The State, *ex rel.* Crow, etc.

As this decision will necessarily bring about the formation of other issues, and a new trial upon these issues in the court below, and as the only questions presented by the second alleged error may not arise on such new trial, we need not consider nor decide those questions now.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to the court below to sustain the appellant's demurrer to appellees' "answer and cross-bill," and for further proceedings.

RICHARDSON, ADM'R, ET AL. v. THE STATE, EX REL. CROW,
BY HER NEXT FRIEND, DEBRULER.

GUARDIAN AND WARD.—*Action on Guardian's Bond.—Pleading.—Breaches.—Joinder of.*—In an action by a ward, against his guardian, upon the latter's bond, for several different breaches of the condition thereof, they may all be joined in one and the same paragraph of complaint.

SAME.—*Instruction to Jury.—Conversion.*—On the trial of an action upon a guardian's bond, for alleged conversion of his ward's estate, it is error for the court to instruct the jury trying the cause, that, if such guardian has taken "notes, for money belonging to his ward, payable to himself, in his own name, that, in law, would amount to a conversion of his ward's estate."

SAME.—*Allowance for Services.*—Where, from the evidence given on the trial of such cause, it appears that such guardian is entitled to no allowance for his services, as such, he can not complain of an erroneous instruction to the jury, by the court, as to the value of such services.

SAME.—*Measure of Damages.—Statutes Construed.*—The measure of the damages that may be recovered in an action upon a guardian's bond is prescribed, not by section 163 (2 R. S. 1876, p. 551) of the act of June 17th, 1852, "providing for the settlement of decedents' estates," etc., but by clause 3 of section 9 (2 R. S. 1876, p. 589) of the act of June 9th, 1852, "touching the relation of guardian and ward," and is "ten per cent. in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward."

SAME.—Section 13 (2 R. S. 1876, p. 592) of the act touching the relation of guardian and ward does not contemplate that section 168 of the act pro-

Richardson, Adm'r, *et al.* v. The State, *ex rel.* Crow, etc.

viding for the settlement of decedents' estates shall govern, as providing a measure of damages, in suits upon a guardian's bond.

SAME.—Case Overruled.—In so far as *Colburn v. The State, ex rel., etc.*, 47 Ind. 310, recognizes a rule different from that recognized herein, as to the measure of damages in a suit on a guardian's bond, it is overruled.

From the Pike Circuit Court.

J. E. McCullough, E. P. Richardson and J. H. Miller,
for appellants.

J. W. Wilson, G. G. Reily, E. A. Ely and W. H. De-Wolf, for appellee.

BIDDLE, J.—Suit by the State, on the relation of Florence Crow, by her next friend, Charles W. DeBruler, against the appellants, who are the representatives of Henry Gladish, guardian of said Florence, and his sureties, founded upon the guardian's bond.

Five several breaches of the bond are assigned in the complaint, and to which several motions were made to require the appellee to paragraph her complaint, and to make it more certain, which motions were overruled, and exceptions taken to the rulings; all of which may be disposed of at once, by saying that there is but one paragraph in the complaint, and that it is sufficiently certain.

The appellants seem to think that each breach of the bond requires a separate paragraph of the complaint. We think otherwise.

The appellants severally demurred to the complaint, each assigning, as ground of demurrer, the insufficiency of the facts alleged to constitute a cause of action. Their demurrers were overruled, and exceptions reserved, but no sufficient ground of demurrer has been pointed out in the brief of appellants, and we can perceive none. *Colburn v. The State, ex rel., etc.*, 47 Ind. 310.

The appellants answered, the appellees replied, issues were joined, a trial by jury had, verdict for the appellee, motion for a new trial, causes assigned, motion overruled, exceptions taken, judgment on the verdict, and appeal. No question is made on the answers and replies.

Richardson, Adm'r, et al. v. The State, ex rel. Crow, etc.

The remaining questions to be examined all arise under the motion for a new trial.

The appellants object to the fifth instruction given by the court to the jury, which, after stating the issue to which it was applicable, is as follows:

"If he [the guardian] took notes for money belonging to his ward, payable to himself, in his own name, that, in law, would amount to a conversion of his ward's estate, as it is the duty of the guardian to keep the funds of his ward, as well as all notes and other indebtedness due to the ward, separate from his own individual business, so that it can be ascertained what are trust funds and what are not."

We can not hold, if a guardian takes a note for money belonging to his ward, payable to himself, in his own name, that the act, in law, amounts to a conversion of the ward's estate. It is, at most, but evidence tending to prove a conversion; and this is as far as the court should have gone in the instruction. There might be many cases in which it would be entirely harmless, and, indeed, proper, to take such notes in the name of the guardian. In all such cases, the rule of law laid down by the court would make the guardian liable in every instance, for the conversion of his ward's estate. We think the instruction is erroneous.

The eighth instruction is in the following words:

"In determining the amount you will allow the said Gladish for his services, as such guardian, in the event you find for the plaintiff, you should take into consideration the amount of interest he had charged himself with, the rate of interest he could reasonably have loaned said funds at, from time to time,—of his allowance for services by the court, up to the time of his death. A guardian who had loaned and collected but a small rate of interest for his ward, ought not to be allowed for his services as much as a guardian who loans and collects for his ward a good rate of interest."

Richardson, Adm'r, *et al.* v. The State, *ex rel.* Crow, etc.

There is nothing in this instruction, we think, of which the appellants can complain. The evidence tends to show that, in some instances, under the 3d clause of section 9, 2 R. S. 1876, p. 590, the guardian would not be entitled to any allowance for services.

The tenth instruction is as follows:

"In the event you shall find for the plaintiff, the measure of damages would be the amount of money or property converted to the use of the said Gladish, or injury sustained by the said ward, interest on the money retained by him, and such exemplary damages as you may be willing to give, under all the circumstances surrounding the case, and ten per cent. damages on the aggregate of the foregoing items, not exceeding in all, as before stated, the sum of ten thousand four hundred dollars."

This instruction is not authorized by the statute (2 R. S. 1876, p. 551, sec. 163) upon which we suppose it is founded. That section is not applicable to the rule of damages on the bond of a guardian. The 3d clause of section 9 (2 R. S. 1876, p. 589) prescribes the rule of damages in a suit on a guardian's bond, namely, ten per cent. on the whole amount of the estate, both real and personal, in his hands belonging to such ward.

Section 13 of the same act enacts, that,

"Any bond given by any guardian, may be put in suit by any person entitled to the estate; and such suit shall be governed by the law regulating suits on the bonds of executors and administrators."

But we can not hold this as embracing the rule of damages declared by section 163, above cited. The Legislature has seen proper to prescribe a different rule of damages for the breach of an administrator's or executor's bond, (sec. 163, *supra*,) from that prescribed for the breach of a guardian's bond, (sec. 9, *supra*,) and as we cannot suppose that they intended to prescribe two different rules of damages for the breach of a guardian's bond, we must adhere to the rule laid down in the act touching the rela-

The State, *ex rel.* Mabbitt, v. Smith.

tion of guardian and ward, rather than to refer it to the rule declared in the act providing for the settlement of decedents' estates. The case of *Colburn v. The State, ex rel., etc., supra*, as far as it approves the rule of damages on the breach of a guardian's bond therein laid down, is overruled.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

THE STATE, EX REL. MABBITT, v. SMITH.

VENUE.—*Change of.*—*Bastardy.*—*Parties.*—A change of the venue of a prosecution for bastardy, from the county where it is pending for trial, can not be granted on an application and affidavit therefor, by and on behalf of the relatrix, she not being a party to such action.

QUERY. Can a change of venue in such cause be granted upon an application made on behalf of the State?

55	385
148	221

From the Madison Circuit Court.

W. R. Pierse and *H. D. Thompson*, for the State.

M. S. Robinson and *J. W. Lovett*, for appellee.

BIDDLE, J.—Prosecution for bastardy, against the appellee. He was found guilty before a justice of the peace. In the circuit court he was found guilty, and a new trial granted to him. Upon a second trial in the circuit court, he was found not guilty. Before the last trial the relatrix filed the following affidavit for a change of venue:

“Comes now Martha J. Mabbitt, the relatrix in this cause, and being duly sworn, on oath says, she can not have a fair and impartial trial of the above entitled cause, at this court, in Madison county, Indiana, on account of

The State, *ex rel.* Mabbitt, *v.* Smith.

the facts that the defendant has an undue influence over the citizens of Madison county, Indiana, and that an odium attaches to this applicant in [the] cause, on account of local prejudice in said county. She therefore prays for a change of venue in this cause."

The motion was overruled, and exceptions reserved.

This presents the sole question in the case, viz.; Has the relatrix in a prosecution for bastardy a right to a change of venue, under the affidavit filed?

In the act regulating the practice, the court, in term, or the judge thereof, in vacation, may change the venue in any civil action, upon the application of either party, made upon affidavit, showing certain causes. 2 R. S. 1876, p. 116, sec. 207.

It will be noticed that the venue may be changed "upon the application of either party;" and also that the application in this case is made on behalf of the relatrix. We have decided that the relatrix is not a party to a prosecution for bastardy. *Ex parte Haase*, 50 Ind. 149. The State is the party plaintiff; the relatrix is the witness. It follows, therefore, that the application is not made within the terms of the statute. *Sullivan v. Sullivan*, 34 Ind. 368.

By common law the parties had no right to a change of venue. Whether we have any statute which will authorize a change of venue in a prosecution for bastardy, when the application is properly made, is not a question before us, and therefore not decided.

The judgment is affirmed, with costs.

 Kyle et al. v. Kyle.

KYLE ET AL. v. KYLE.

55	387
143	236

PARTITION.—Action.—A proceeding for the partition of lands is a “civil action,” within the meaning of the term as used in section 34 of the practice act of this State (2 R. S. 1876, p. 46.)

SUMMONS.—Service.—By Whom to be Made.—Service of a summons in a civil action can be made only by the sheriff to whom it is directed, or by his deputy, or, in case of the absence, interest or incapacity of such sheriff, by the proper coroner.

SAME.—Statute Construed.—Section 292 of the practice act of this State (2 R. S. 1876, p. 154,) provides only as to the mode of making proof of the service of process, and not as to how or by whom such service shall be made.

SAME.—Section 37 of such practice act (2 R. S. 1876, p. 49) refers to the manner, only, of service of summons, and not to the person by whom it may have been made.

SAME.—Jurisdiction.—Where service of summons is made by an unauthorized person, no jurisdiction of the person so served is thereby acquired by the court.

SAME.—Appeal.—Judgment.—Supreme Court.—A defendant against whom a judgment has been rendered, by default, in the circuit court, without having first acquired jurisdiction of his person, may, in the first instance, appeal to the Supreme Court, without applying to such circuit court to set aside such judgment.

SAME.—Judgment.—Partition. — Practice.—A judgment partitioning lands can not be reversed in part and affirmed in part, but the entire judgment must be set aside, if reversed, by the Supreme Court.

From the Montgomery Circuit Court.

J. McCabe and *M. D. White*, for appellants.

T. H. Ristine and *A. Thomson*, for appellee.

WORDEN, C. J.—This was an action by the appellee, against the appellants, for the partition of certain real estate, in which such proceedings were had as that judgment for partition was entered, commissioners appointed to make partition, report of commissioners returned making partition, and the report confirmed.

Errors are assigned in the names of the defendants below; and, among other things, it is assigned for error that the court below never obtained jurisdiction over the defendants below, the appellants herein.

Kyle et al. v. Kyle.

The complaint alleged that George E. Kyle died seized of the land sought to be parted, and that one-third thereof went to the plaintiff, his widow, and the two-thirds to twelve children, naming them, who were made defendants. Among the twelve children were James F. Kyle and John W. Kyle, both of whom appeared to the action. Also, Silas F. Kyle and Mildred J. Young, who did not appear. It is perhaps unnecessary to enquire whether the other eight were properly brought into court, as they have filed a paper in the cause, asking that the appeal be dismissed as to them. James F. Young, who, we suppose, is the husband of Mildred J. Young, signed the same paper, but he did not sign it on behalf of his wife, nor did he ask that the appeal be dismissed as to her. He was a party, and asked that the appeal be dismissed as to himself.

It becomes necessary to enquire, therefore, whether the court below acquired jurisdiction over Silas F. Kyle and Mildred J. Young.

The record sets out a summons in the cause, directed to the sheriff of Montgomery county, and commands him to summon, among others, Silas F. Kyle and Mildred J. Young. Then there is an affidavit of Luke J. Dickerson, who is not claimed to have been the sheriff or his deputy, by which it appears that Dickerson served the summons on Silas F. Kyle and Mildred J. Young, among others, by reading the same to them, at said county.

This is all the evidence there is in the record, that the court acquired jurisdiction over these parties.

The appellee claims that the service of the summons by Dickerson was good. We are of opinion, however, that it was a nullity, and gave the court no more jurisdiction over the parties than if it had not been served at all. The statute provides that the "sheriff shall * * * execute all process directed to him by legal authority, either in person or by deputy," etc. 2 R. S. 1876, p. 18, sec. 2.

"A civil action shall be commenced by filing in the

Kyle et al. v. Kyle.

office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons; but, as to those against whom publication is made, from the time of the first publication. The summons shall be issued by the clerk, under the seal of the court, and directed to the sheriff," etc. 2 R. S. 1876, p. 46, sec. 34.

Thus it is seen that a summons in an action is to be directed to the sheriff, and is to be served by him, either in person, or by deputy.

"Actions" are brought for the partition of lands. 2 R. S. 1876, p. 257, sec. 626.

The statute provides that "The proof of the service of any process issued by the court, or of any notice required to be served upon any party, shall be as follows:

"*First.* If served by the sheriff, his certificate thereof: or,

"*Second.* By any other person, his affidavit thereof; or,

"*Third.* In case of publication, a printed copy, with the affidavit of the printer, his foreman, or clerk, or of any competent witness.

"*Fourth.* The written admission of the defendant. The affidavit or admission must state the time and place of service." 2 R. S. 1876, p. 154, sec. 292.

This statute does not authorize the service of a summons to the defendant in a cause, to be made by any other person than the sheriff or his deputy. There are some processes and some notices that may be served by the party or any other person, as a subpoena (called in the statute a summons) for witnesses. 2 R. S. 1876, p. 130, sec. 229.

The statute above set out was intended to provide for the mode of proof of service, and not the person by whom service may be made. In cases where the service is required to be made by the sheriff, his official certificate of service is required. Where the service may be made by another person, his affidavit is sufficient.

Kyle *et al.* v. Kyle.

Another statutory provision has been cited, viz.: That "No summons, or the service thereof, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court." 2 R. S. 1876, p. 49, sec. 37.

This provision, so far as it has reference to service, clearly applies to the manner of service, and not to the person by whom it is made.

It was not intended by it to make the service of a summons, by any one who might assume to serve it, good, if there was sufficient substance about the service to inform the party of an action instituted against him in court.

It may be observed, also, that provision is made for the discharge of the duties of the sheriff by the coroner, in cases where the sheriff is interested, absent or otherwise incapacitated from serving. 2 R. S. 1876, p. 20, sec. 2.

Where the party to be served is a non-resident of the State, a sheriff having no official authority beyond the limits of the State, the summons may be served by another person, and the service proved by his affidavit. 2 R. S. 1876, p. 50, sec. 39. But that is not this case. Here, the service was made in Montgomery county, in this State.

We think the court acquired no jurisdiction over Silas F. Kyle or Mildred J. Young.

But it is claimed by the appellee, that, conceding a want of jurisdiction over these persons, they can not, in the first instance, appeal to this court, but that they must first have applied to the court below to set aside the judgment. We are aware that there are several cases to that effect. But the more recent rule is, that where the court below has rendered a judgment against a party, without having acquired jurisdiction over him, he not having appeared to the action, he may at once appeal to this court, without having applied to the court below to

Peters v. Lane et al.

set the judgment aside. *Abdil v. Abdil*, 26 Ind. 287; *Cochnowar v. Cochnowar*, 27 Ind. 253.

The judgment will have to be reversed, and we see no way of reversing it in part and affirming it in part.

The reversal of the judgment as to one or more of the parties will unsettle the whole partition and require a new one to be made.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

Petition for a rehearing overruled at the May Term, 1877.

PETERS v. LANE ET AL.

INTERROGATORIES TO JURY.—*Answers.—Uncertainty.*—Where to a pertinent, direct interrogatory, put to the jury trying a cause, they return an uncertain or doubtful answer, the court trying such cause must, on motion therefor, made before the discharge of such jury, instruct them to return a direct and certain answer.

SAME.—Where the answer to an interrogatory is in other respects certain and direct, the prefacing or adding thereto, by the jury, of the phrase "in our judgment," does not render it uncertain.

SAME.—*Venire de Novo.*—Where the answer of a jury to a pertinent, direct interrogatory is uncertain, a motion for a *venire de novo* should be sustained.

From the Boone Circuit Court.

C. C. Galvin and C. S. Wesner, for appellant.

Clements & Wills, B. K. Elliott and A. C. Ayres, for appellees.

BIDDLE, J.—The appellees allege in their complaint that they were the owners of a saw-mill in Boone county, and were engaged in manufacturing lumber; that, to enable them to carry on their business, they appointed the appellant their agent, at Whitestown, Indiana, to receive, handle, ship, and sell, for the appellees, the lumber they manufactured; that by the terms of their agreement, appellees

Peters v. Lane et al.

were to deliver lumber to the appellant, who was to sell the same for them at the best market price, to furnish bills, pay expenses, and account to appellees for all moneys remaining in his hands, which he received for lumber sold for them; that under the above contract, between the 1st day of June, and 30th day of December, 1872, they furnished and delivered to the appellant, at Whitestown, three hundred and fifty-seven thousand feet of poplar, ash, elm and sycamore lumber, of the value of six thousand three hundred and thirty dollars; that the appellant received and sold the same, and received therefor six thousand three hundred and thirty dollars, of which he accounted to the appellees, for the sum of two thousand five hundred dollars, leaving in his hands three thousand eight hundred and thirty dollars, for which he has failed to account; that appellees demanded the same from him, and that he make settlement therefor, furnish bills, etc., which he has wholly refused to do. Wherefore, etc.

There are three other paragraphs in the complaint, which need not be set out; nor need we state the answers and replies, as no question is made upon the pleadings. Issues were joined, a trial by jury had, a verdict for the appellees returned, with special interrogatories and answers, among the latter of which were the following:

"2. What amount of lumber did plaintiffs furnish defendant at Whitestown, Indiana, from the 1st day of June, 1872, to December 30th, 1872?

"Answer. Can't say, definitely.

"6. What amount of lumber did plaintiffs furnish defendant from the 30th of December, 1872, to June 1st, 1873?

"Answer. Can't say, definitely.

"11. What amount, per one thousand feet, did the defendant receive for the lumber furnished him by the plaintiffs during the year 1872?

"Answer. Can't say, definitely.

"13. What amount has he failed to account for?

Peters v. Lane et al.

"Answer. In our judgment, eleven hundred and sixty-six dollars.

"15. Did plaintiffs sell fifty-two thousand feet of ash lumber to defendant, during the year 1873?

"Answer. Yes, ash and oak."

After the return of the verdict, and before the jury were discharged, the appellant moved the court to instruct the jury to definitely answer the above interrogatories; but the court "having received a response from the jury that the foregoing is their verdict, and their answers to the interrogatories propounded," overruled the motion, and the appellant excepted.

The answer to interrogatory thirteen, we think is sufficiently plain. It amounts to finding the sum as stated. The words, "in our judgment," do not render it uncertain or doubtful. But the answers to interrogatories two, six, eleven and fifteen, are insufficient. The questions were direct and pertinent to the issues. The jury were as much bound to answer them as they were to render a general verdict; and it was the duty of the court, under the motion, to require them to give a plain and direct answer to each interrogatory, unless, upon due consideration, they could not agree. This practice is well settled. *Buntin v. Rose*, 16 Ind. 209; *Rosser v. Barnes*, 16 Ind. 502; *Noble v. Enos*, 19 Ind. 72; *Noakes v. Morey*, 30 Ind. 108; *Sage v. Brown*, 34 Ind. 464; *Maxwell v. Boyne*, 36 Ind. 120; *Reeves v. Plough*, 41 Ind. 204; *Hopkins v. Stanley*, 43 Ind. 553; *Rowell v. Klein*, 44 Ind. 290; *Bradley v. Bradley*, 45 Ind. 67; *Bowman v. Phillips*, 47 Ind. 341.

For these defects in the answers to the interrogatories, the appellant moved the court for a *venire de novo*, which the court denied, and the appellant excepted. This ruling is erroneous. *The Cincinnati, etc., R. R. Co. v. Washburn*, 25 Ind. 259; *Marcus v. The State*, 26 Ind. 101; *Trout v. West*, 29 Ind. 51; *McElfresh v. Guard*, 32 Ind. 408; *Pea v. Pea*, 35 Ind. 387; *Vater v. Lewis*, 36 Ind. 288; *Gulick v. Connely*, 42 Ind. 134.

 Wilson v. Vance, Adm'r'x.

The judgment is reversed, with costs, and cause remanded for further proceedings.

 WILSON v. VANCE, ADM'R'X.

55	394
134	574
55	394
147	306
55	394
150	411
55	394
154	342
55	394
163	81

NUNC PRO TUNC ENTRY.—*Office of.*—*Record.*—The office of a *nunc pro tunc* entry is, to cause to be entered of record, at a subsequent term, some action had in a cause, but omitted from the record, at a prior term; not to enter, now for then, something occurring only at the subsequent term.

NEW TRIAL.—*Cause For.*—*When Filed.*—*Statutory Requirement.*—*Waiver of.*—*Practice.*—If, at the term when a motion for a new trial is made, the court, without objection from the party opposing such motion, grant time until the first day of the next term, to file written causes for such motion, such party will be deemed to have waived the statutory requirement that such causes must be filed at the time such motion is made, and to have acquiesced in such extension.

SAME.—*Causes Filed too Late.*—Where such extension has been so granted and acquiesced in, the filing of such causes at a day subsequent to the time fixed, to which the opposite party objects, is too late, unless such causes were discovered after the term at which such motion was made.

SAME.—*Statute Construed.*—*Words and Phrases.*—The word "decision," as used in section 354, (2 R. S, 1876, p. 183) refers to the finding of facts in a cause tried by the court.

From the Hendricks Circuit Court.

J. Buchanan, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellee.

WORDEN, C. J.—Action by the appellee, against the appellant. Judgment for plaintiff.

No questions arise here, except such as are involved in a motion for a new trial.

The record shows the following facts:

At the September term, 1873, of the court below, the cause was submitted to the court for trial, the evidence heard, and day given for argument.

Wilson v. Vance, Adm'r'x.

Afterwards, at the November term, 1873, viz., on the 13th day of December of that year, and the 24th juridical day of the term, the court found for the plaintiff and assessed her damages. "Thereupon," says the record, "the defendant moves the court for a new trial in this cause, and is given until the first day of the next term of this court to prepare and file his reasons for a new trial." This action of the court does not seem to have been objected or excepted to by the plaintiff below.

Afterwards, on the 5th juridical day of the February term, 1874, the next term after that at which the proceedings last stated were had, the court, on motion, caused an entry to be then made, as of the preceding term, giving the defendant until the 6th juridical day of the then present term to prepare and file his causes for a new trial. To this the plaintiff below excepted.

The *nunc pro tunc* entry thus made does not profess to be an entry of what was really ordered at the previous term, but not then entered. It was an order made at the time it was entered, but ordered to be entered as of the previous term.

The office of a *nunc pro tunc* entry is, to make a record of what was previously done, but not then entered; not to make an order, now for then, but to enter, now for then, an order previously made.

The bill of exceptions states the matter as follows:

"The parties come by counsel, and the court orders a *nunc pro tunc* entry to be made, of this date, changing the entry heretofore entered in this cause on the 13th day of December, 1873, being the 24th juridical day of the November term of said court, so as to allow the defendant until the 6th day of the present term of this court, to file his reasons in support of his motion for a new trial, which entry is in the words and figures following," etc.

On the 6th day of the term the defendant filed his written motion for a new trial, with the causes therefor,

Wilson v. Vance, Adm'r's.

but the plaintiff objected to the filing thereof; his objection, however, was overruled, and he again excepted.

The motion was subsequently overruled, and judgment entered on the finding.

It is not claimed that any of the causes for a new trial were discovered after the term at which the finding was had, and the question arises, whether the causes for a new trial were filed in time.

The statute provides, that "The application for a new trial must be made at the term the verdict or decision is rendered."

"The application must be by motion, upon written cause, filed at the time of making the motion." 2 R. S. 1876, p. 183, secs. 354-355.

The term "decision," as used in the above statute, is clearly used in the sense of finding upon the facts, where the cause is tried by the court. As the motion is to be made at the term at which the verdict or decision is rendered, and as the causes are to be filed at the time of making the motion, it follows that they must be filed at that term. The statute is imperative, and the court can not grant time beyond the term against the consent of the parties. *Krutz v. Craig*, 53 Ind. 561.

Doubtless, the parties might agree upon an extension of time, as they may waive any right to which they are by law entitled. And where an order is made for an extension of time, as in this case, until the first day of the next term of the court, without objection, the parties should perhaps be deemed to consent, because they do not object, thereto.

Assuming that the appellee consented, because she did not object, to the giving of time until the first day of the February term, 1874, of the court, the record shows that she did not consent to any further extension. The first day of that term of the court came, and the causes were not filed. The court could not, by an order then made,

Storey et al. v. Krewson et al.

entered *nunc pro tunc*, extend the time previously given, over the objection of the appellee.

The causes were filed too late, and no question is before us, arising on the motion for a new trial.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

STOREY ET AL. v. KREWSON ET AL.

53	397
141	312
142	93

TENDER.—Condition.—Promissory Note.—Payable in Bank.—A tender of the amount due upon a promissory note payable in a bank of this State, made upon the condition that such note shall be surrendered, is sufficient.

QUERY.—Does such condition, attached to a tender of the amount due upon such an instrument, not so payable, render the tender insufficient?

SAME.—Debt Secured by Mortgage.—Satisfaction.—A tender of the amount due upon a promissory note secured by a mortgage on real estate, made upon the condition that such mortgage shall be released or cancelled, is insufficient.

SAME.—Statute Construed.—Section 5 of "An act concerning mortgages," approved May 4th, 1852, (2 R. S. 1876, p. 333) requires a mortgagee of lands to enter satisfaction thereof only upon his having received, not a tender, merely, but, full payment, of the debt secured thereby.

From the Marion Superior Court.

G. W. Richardson and *L. H. Richardson*, for appellants.

E. A. Parker, for appellees.

BIDDLE, J.—On the 1st day of December, 1873, Mary C. Henderson, and James M. Henderson, made their joint promissory note, payable seven months after date, to Harrison Owens and Narcissus Owens, for five hundred dollars, with interest, negotiable and payable at Fletcher & Sharpe's bank, in Indianapolis, without relief, etc., and at the same time executed a mortgage, conveying to the payees of the note a certain tract of land therein described, to secure payment of the note. Harrison Owens endorsed

Storey et al. v. Krewson et al.

the note and mortgage, in writing, and Narcissus Owens assigned the same, by delivery, to John W. Moore, who endorsed the same to the appellants. Afterwards, on the 1st day of July, 1874, Mary C. Henderson and James M. Henderson sold and conveyed the lands described in the mortgage to Amos D. Krewson and Datus E. Myers, who, as a part of the purchase-money, assumed the payment of the note made by the Hendersons to the Owens, secured by the mortgage on the same lands. The appellants brought this suit to recover upon the note, and to foreclose upon the mortgage, making Krewson and Myers, and Narcissus Owens, who had assigned the note and mortgage merely by delivery, defendants to their complaint.

Krewson and Myers answered, admitting the note and mortgage, and that they had purchased the land, and assumed the payment of the note; alleging that they made certain payments on the note, and on the 21st day of November, 1874, called upon the appellants to pay them the balance due, and were informed by them that the balance due on the note was two hundred and thirty-three dollars and forty-eight cents; and that, thereupon, at the same time and place, these defendants counted out and handed to these plaintiffs the said sum of two hundred and thirty-three and $\frac{48}{100}$ (\$233 $\frac{48}{100}$) dollars, in full payment and satisfaction of said note and mortgage; that plaintiffs then and there took said money, handed them by defendants, counted the same, and remarked to the defendants that it was all right and satisfactory, and they would accept the same in payment of said note and mortgage. Defendants then and there demanded the surrender of said note, and the cancellation of said mortgage; whereupon the plaintiffs offered to surrender said note, but, wrongfully, fraudulently, for the purpose of oppressing these defendants by the bringing of this suit, refused to cancel, or have cancelled, said mortgage; the defendants then reserved the said money in their own possession,

Storey et al. v. Krewson et al.

making the same a tender to said plaintiffs for said payment of said note and mortgage, and cancellation of the same. That said money was good and lawful legal tender money of the Government of the United States, denominated "legal tender," or treasury note, currency. That these defendants now come and in open court continue to make said tender, and do now so tender said sum of money, to wit, the sum of two hundred and thirty-three and $\frac{48}{100}$ (\$233 $\frac{48}{100}$) dollars, which sum they have paid into court for the benefit of plaintiffs, and the satisfaction of said note, and the cancellation of said mortgage, as heretofore tendered. That from the time of said forementioned tender, continually and constantly, these defendants have held said money subject to the order of the plaintiffs, and for the payment of said debt and cancellation of said mortgage, until the time of depositing said money with the clerk of the court, which is evidenced by the receipt of the said clerk hereto attached and made a part hereof, all of which facts were well and truly known to the plaintiffs at the time of bringing said suit. Wherefore, etc.

A demurrer, alleging the insufficiency of the facts stated, was overruled to this answer, and exceptions reserved. The proceedings, which need not be any farther stated, resulted in a judgment for the appellants, against the appellees, for the sum tendered, in the custody of the clerk, and for the costs, against the appellants and in favor of the appellees.

Was the tender, made upon the condition that the appellants should cancel the mortgage, sufficient? This is the decisive question in the case. In all other respects the tender, as alleged in the answer, is good.

The appellees insist that they had the same right to demand the cancellation and satisfaction of the mortgage from the appellants, as the makers of the note had to demand the same from the payees and mortgagees, in case the note had been paid by them; that the payment of the note, its surrender, and the cancellation of the

Storey et al. v. Krewson et al.

mortgage, were simultaneous acts, neither of which could be demanded without the performance of the other; and cites us to Story on Promissory Notes, sections 106 and 107, and the notes thereto. Neither Mr. Story, nor the notes, nor the authority cited, support the appellees, any farther than as to the surrender of the promissory note upon tender of payment being made. They say nothing about the cancellation of a mortgage.

When mutual acts are to be done by two parties, at the same time, and the right of each depends upon the performance of the other, either may tender his part of the performance, upon the condition that the other performs his part; and neither is compelled to perform his part unless the other performs his part, also; as when land is bargained and sold, to be conveyed upon payment of the purchase-money. In such a case, neither can be compelled to perform his part of the agreement, except on performance by the other of his part; that is, the vendee can not demand the conveyance without tendering the purchase-money; and the vendor can not demand the purchase-money without tendering the conveyance; and either may make a good tender to the other, upon the condition that he will perform his part of the agreement.

But when one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition, as when money is to be paid without condition. The current of authorities—indeed, we believe it to be quite uniform—holds that the party bound to pay the money can not make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note, the authorities are in conflict, whether a good tender can be made upon the condition that the note shall be surrendered; but in the case of commercial paper, the authorities seem to be uniform, that a tender upon condition that the paper shall be surrendered, is

Storey et al. v. Krewson et al.

good, because such paper might be put in circulation, after payment, and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker, it becomes harmless, as against him, wherever it may go. A tender, to be good, must not be upon any condition prejudicial to the party to whom it is made.

The mortgage is merely the incident to the note. The payment or satisfaction of a note secured by a mortgage is a full and complete discharge of the mortgage. According to the rules above expressed—and we believe they are correct and well sustained by authority—the answer we are considering is insufficient as to the averment of tender. The acceptance of the money, as alleged, and the surrender of the note, operated as a complete legal discharge of the mortgage by which the payment of the note was secured, as much so as if it had been surrendered with the note, released upon the record, or actually cancelled. The appellees had no right to demand a cancellation of the mortgage as a condition to the tender,—it would in no way have strengthened their right nor placed them in any better legal status—for the surrender of the note, upon its payment, worked the destruction of all legal vitality in the mortgage. *Armstrong v. Murphy*, 2 Ind. 601; *Sherman v. Sherman*, 8 Ind. 387; *Ledyard v. Chapin*, 6 Ind. 320; *Francis v. Porter*, 7 Ind. 213; *Bickle v. Beseke*, 23 Ind. 18; *Lynch v. Jennings*, 43 Ind. 276; *Rose v. Duncan*, 49 Ind. 269; *Roosevelt v. The Bull's Head Bank*, 45 Barb. 579.

~~We think~~ a demand to cancel the mortgage, as a condition of the tender, is not different in principle from demanding a receipt as a condition to the payment of money.

It would be the duty of the appellants, after “having received full payment of the sum” secured by the mortgage, to “enter satisfaction on the margin or other proper place in the record of such mortgage,” according to sec-

Patterson et al. v. Ransom.

tion 5, 2 R. S. 1876, p. 334; but they could not be required to do so, merely upon a tender of the amount, as a condition to their right to receive the money. The section cited would not bear such a construction.

The judgment, as to the costs below, is reversed, with costs here; cause remanded, with instructions to proceed according to this opinion.

PATTERSON ET AL. v. RANSOM.

WILL.—Law of Place.—Though the last will of a testator may have been executed and attested in another State, yet, if he die while domiciled in this State, the law of the latter must be applied by her courts in determining whether such will has been duly executed.

SAME.—Execution of.—Attesting.—Intention of Testator.—Parol Evidence of.—

The execution of his last will, by the testator, having been attested by but one witness, such testator afterwards, at a different place, and in the absence of such witness, executed an endorsement upon the back of such will, reading, "The within is the basis on which I desire to have my affairs disposed of, should no other will be made by me," which endorsement was attested by another witness, to whom its contents had been made known, and the signatures to such will exhibited, by such testator. *Held*, in an action to contest the validity and resist the probate of such will, that it had not been executed according to law and is therefore invalid.

Held, also, that it can not be established by parol evidence, that the signature of such witness, to such endorsement, was intended by the testator, and executed by such witness, as an attesting of such will.

From the Floyd Circuit Court.

J. H. Stotsenburg and J. C. Latimer, for appellants.

G. V. Hawk, W. W. Tuley, C. Baker, O. B. Hord and A. W. Hendricks, for appellee.

WORDEN, C. J.—This action was brought by the appellee, the widow of Hyatt C. Ransom, deceased, against the appellants, to contest the validity and resist the pro-

Patterson et al. v. Ransom.

bate of the supposed last will of said deceased, on the ground that the same had not been duly executed. There was a trial of the cause by the court, resulting in a finding that the supposed will had not been duly executed, and judgment accordingly.

The appellants make no question, here, except that arising on the motion for a new trial.

The supposed will need not be set out, as the sole question presented is, whether it was duly executed. It was signed and attested as follows:

“Signed at Franklin, Tenn., March 11th, 1863.

“H. C. RANSOM,

“Witness,

“Captain A. Q. M., U. S. Army.”

“C. F. WOOD.”

It was admitted upon the trial of the cause, that Charles F. Wood, whose name appears as C. F. Wood, under the word “witness” in the paper, signed the paper, in the presence of Ransom, at his request, on March 11th, 1863, at Franklin, Tennessee; that, at the time of executing the writing, Ransom declared the same to be his will; that he was then and there of sound mind and competent to devise his property, and not under coercion; that Wood signed as such witness, after Ransom signed, and that the writing was all in the handwriting of said Hyatt C. Ransom.

On the back of the will was the following endorsement, viz.:

“FLINT, MICH., Oct. 21st, 1867.

“The within is the basis on which I desire to have my affairs disposed of, should no other will be made by me.

“H. C. RANSOM,

“Witness,

“Br’v’t. Lt. Col. and Q. M.”

“F. F. HYATT.”

As F. F. Hyatt was the only witness who explained the endorsement on the back of the will, we set his evidence out in full. He said, in answer, as we suppose, to questions propounded:

Patterson et al. v. Ransom.

“My name is Ferris F. Hyatt. I was born in 1825. I reside in Flint, Michigan. I supervise my own business affairs, and am president of The First National Bank of Flint. I knew Hyatt C. Ransom, from the time I was three years old. From that time, he was kept at my father's house, until he went to West Point, at the age of twenty-one years. I saw him last in life in September, 1872, at St. Paul, Minnesota. He was then an officer in the United States army, in the quartermaster's department. I have seen this will before (looking at the will). It is in his, Colonel Ransom's, handwriting, is signed by him, and by C. F. Wood as witness. I saw it in December, 1863. My signature is on the back of that paper. It was put there on October 21st, 1867, at my office, in Flint, Michigan, at the request of Hyatt C. Ransom, and in his presence. There was nobody else there. I had then had it in my possession from its date. He wrote the endorsement, signed it and wished me to witness it. Before I endorsed, I had seen both the signatures to the will. He called my attention to the fact, that, in signing this endorsement, I was witness, not only to the endorsement, but to the will. He opened the will and tapped where his signature was. I had told him maybe the will would not be valid with one witness. He was then of sound mind, and under no coercion. In October, 1868, I sent this will to Elmira, New York, to him, by his directions. I found it at Jeffersonville, Indiana, the Monday after his death, among his papers. It was with his notes, insurance policies and certificates of bank-stock. One of the insurance policies was for ten thousand dollars, on his life, in favor of the plaintiff, and dated one year before his death. His mother and mine were sisters. His sister, Elizabeth F. Ransom, of whom he was very fond, was a cripple, and had been supported by him ever since 1860. His relations to his brothers and sisters were very kindly. He knew all about Mrs. Ransom's separate property.”

On cross-examination, he said;

"I found the will the Monday after his death. It was brought from the bank by Mr. Harry Sage. There were other papers in the bundle. I thought at the time that my signature cured the defect, but afterwards, at St. Paul, I told him that I feared it was imperfect; and afterwards I wrote to him at New Orleans, requesting him to make a will, but I don't know what became of the letter."

It is shown by the evidence, and, indeed, conceded by counsel on each side of the case, that the deceased, at the time of his death, was domiciled in Indiana. It is therefore properly assumed by the respective counsel, that the law of Indiana, alone, must be applied in determining whether the supposed will was duly executed.

Our statute provides that "No will except a nuncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses;" etc. 2 R. S. 1876, p. 575, sec. 18.

The statute requires that a will shall be attested and subscribed, in the presence of the testator, by at least two competent witnesses; and the question here is, whether the will was attested and subscribed as required.

Assuming that F. F. Hyatt can be regarded as having attested and subscribed the will as a witness thereto, then the attestation and subscription of the two witnesses were separated by an interval of time of over four years and a half, and by a space of several hundred miles. We are aware that there are many cases holding that the witnesses need not attest at the same time. But this has been changed for the better in England, by a statute which requires that the will shall be signed by the testator, in the presence of two witnesses, at one time. See 1 Greenl. Ev., sec. 272 and note 5.

It is said that "The attesting witnesses are regarded in the law as persons placed round the testator, in order that no fraud may be practised upon him in the execution

Patterson et al. v. Ransom.

of the will, and to judge of his capacity." 2 Greenl. Ev., sec. 691; 1 Williams on Ex'rs, 5 Am. Ed., p. 60, note. By our law, as we have seen, two witnesses are required. They are to attest and subscribe the will. It is their province to judge of the mental soundness of the testator, and they are required, in order that no fraud be practised upon him. The statute contemplates that both shall witness and attest the same transaction. Separated, as these attestations were, both in time and space, each of the witnesses knew nothing of what transpired at the time of the attestation by the other. Wood, when he attested and subscribed the will, of course, knew nothing of the testator's mental condition, or the circumstances transpiring over four years thereafter, when Hyatt placed his name upon the will. If the will was ever executed at all, it was not until Hyatt placed his name upon it. And yet Wood witnessed nothing that then transpired. So, on the other hand, Hyatt witnessed nothing that transpired when Wood attested the will. If the case turned upon this point, we should feel under the necessity of examining the authorities closely before deciding that such attestation would be a compliance with the statute.

But we are of opinion that F. F. Hyatt can in no sense be regarded as having subscribed the supposed will.

He subscribed the endorsement on the back of the will, and nothing more. He seemed to be anxious, and, for aught that appears, properly so, that the will should be perfected. He had told the deceased that perhaps the will would not be valid with but one witness. When he put his name to the endorsement he thought that cured the defect, but afterwards, at St. Paul, he told the deceased that he feared it was imperfect; and still later he wrote the deceased at New Orleans, requesting him to make a will.

When the witness suggested to the deceased that perhaps the will would not be valid with but one witness, if the latter had desired the witness to subscribe the will as

Patterson et al. v. Ransom.

a witness thereto, it is quite natural to suppose that he would have requested him to subscribe it as such witness. But instead of this, the deceased wrote the endorsement upon the back of the will, and the witness subscribed that. By the endorsement, the mind of the deceased seems to have been unsettled and undetermined, as to whether the will provided for such a final disposition of his property as he might desire to make. The endorsement says:

“The within is the basis on which I desire to have my affairs disposed of, should no other will be made by me.”

The mind of the deceased seemed to contemplate that he might desire to make another and a different will. This is hardly such language as we might expect from the deceased, if he regarded what then transpired as a complete execution of the will, making a final disposition of his affairs.

But the question still remains, whether the witness subscribed the will when he subscribed the endorsement. He testified that the deceased called his attention to the fact, that, in signing this endorsement, he was witness, not only to the endorsement, but to the will; that “he opened the will and tapped where his signature was.”

We can not regard the endorsement upon the will in any other light than as if it were an equivalent writing upon any detached paper. The only advantage of being upon the will is, that it clearly identifies the document to which it relates.

Any other writing to the same effect, clearly identifying the will to which it related, duly signed and witnessed, would have been in all respects as efficacious as that endorsed upon the will. Now, suppose the deceased, instead of writing upon the will, had written the same thing, in substance, upon a separate piece of paper, referring to the will so as to identify it, and the witness had subscribed it, as he did the endorsement, would the fact that the deceased called the attention of the witness to the proposi-

Patterson et al. v. Ransom

tion, that, in signing the paper, he was witness, not only to the writing, but to the will itself, make his subscription to the paper a subscription to the will? If so, the positive requirements of the statute as to the mode of executing wills may be dispensed with, and it will be sufficient to show that the supposed testator intended to execute a will, in the manner prescribed by law, but which he failed to do.

The counsel for the appellants, in a well prepared brief, filed in reply to the argument of the appellee, after discussing the admissibility of parol evidence, deduce from the authorities the following proposition, which seems to us to be correct:

“The true principle of law which runs through and harmonizes all these and other like cases, is this: Evidence, both written and parol, is admissible and competent to show that the requirements of the statute have been complied with; but it can not be made sufficient as a substitute for the requirements of the law.”

The law requires a will to be attested and subscribed by two witnesses. Hyatt, in this case, did not subscribe the will. He subscribed merely the writing endorsed upon the will. And we can not substitute, in place of his subscription to the will, parol evidence that his subscription to the endorsement was intended as a subscription to the will.

In our opinion, the finding below was right, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

NOTE. HOWK, J., having been of counsel in the cause, was absent when it was considered.

Blair v. Allen.

BLAIR v. ALLEN.

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COVENANT.—*Collateral Warranty.*—*Breach after Settlement of Deceased Covenantor's Estate.*—*Suit against Heir.*—*Statute of Limitations.*—*Statutes Construed.*—*Measure of Damages.*—*Eviction.*—*Notice.*—*Husband and Wife.*—*Covenant of Married Woman.*—*Pleading.*—A testator dying the owner of a tract of land devised it to his widow, during her life, with remainder in fee to A. and B., in common; such widow marrying C., she and C., by a deed containing a covenant of title, specially binding themselves and their heirs, in stipulated damages, for a breach thereof, jointly conveyed such land to another, who then conveyed it to A.; C., first, and then such widow, dying, D., their child, inherited and received an estate from his father, C.; afterwards, and after the estate of the latter had been finally settled according to law, B., in an action for that purpose against A., obtained a decree settling in himself the title to and the right of possession of the undivided half of such land, thus causing a breach of such covenant of title made by C. and his wife, and for which breach A. brought an action against D. as the heir of C.

Held, on demurrer, that the right of action for such breach not having accrued until after the final settlement of C.'s estate, it is not barred, either by such final settlement, nor by the provisions of sections 62 and 178 of the act of June 17th, 1852, (2 R. S. 1876, p. 491) "providing for the settlement of decedents' estates," etc.

Held, also, that D. is liable for such breach, in damages not exceeding the amount of estate received by him of C.

Held, also, that such covenant is not personal but runs with the land, and a breach thereof is sufficiently shown by an averment of an eviction of A., by B., under a paramount title.

Held, also, that an averment that A. had been in possession of such land is unnecessary.

Held, also, that it is unnecessary to aver that D. had had notice of such action by B., against A.

Held, also, that the fact that a married woman is not bound by her covenant, in which her husband joins, in conveying her land, does not release him.

From the Clinton Circuit Court.

L. McClurg and J. V. Kent, for appellant.

J. Claybaugh and J. C. Campbell, for appellee.

BIDDLE, J.—This action was brought, in the court below, by Alexander W. Blair, against Samuel H. Allen, to recover damages for breach of a covenant of warranty in a deed. The second amended complaint alleges, that, "In the year 1828, William B. Blair, the father of appellant, died testate,

Blair v. Allen.

in Nicholas county, Kentucky, leaving surviving him his widow, Nancy, (afterwards Nancy Allen) also appellant and one Joseph E. Blair, his children and only heirs, and sole legatees. That said William devised to said Nancy a life-estate in certain real estate therein described, with remainder over in fee-simple to appellant and Joseph E. Blair, as tenants in common. That afterwards said Nancy intermarried with one James Allen, and had, as issue of said marriage, appellee. That afterwards, on the 5th day of February, 1833, Nancy Allen and her husband, James Allen, sold said real estate to one Robert Shannon, for seven hundred and twenty-five dollars, and executed to him their deed of general warranty for the same. That on the 28th day of June, 1841, the land was conveyed by Shannon to Robert Berry, and that on the 14th day of January, 1850, Robert Berry sold and conveyed the land to William T. Berry, and that afterwards, on the 29th day of March, 1854, William T. Berry sold and conveyed the same tract to appellant. That said James and Nancy, by their said deed of conveyance, covenanted by and with said Shannon, his heirs and assigns, that in case the title to said real estate should fail and the same be lost by reason of any superior title, and by due course of law, then and in that case they bind themselves, their heirs, etc., to pay said Shannon, his heirs and assigns, the sum of seven hundred and twenty-five dollars. That afterwards James Allen died, leaving Nancy, his widow, and appellee, his only child and sole heir. That afterwards, in the year 1872, Nancy Allen (formerly Nancy Blair,) died in Clinton county, Indiana. That after the death of said Nancy, to wit, at the September term of the Nicholas Circuit Court, for Nicholas county, Kentucky, for the year 1873, said Joseph E. Blair brought his action at law against appellant, alleging in his complaint that he was the owner and entitled to the possession of the undivided one-half of said real estate as legatee of said William B. Blair.

“ That said court then gave judgment that said Nancy

Blair v. Allen.

Allen (formerly Blair) took only a life-estate in said premises, and that, upon her death, passed by operation of law to said Joseph E. Blair and Alexander W. Blair, as tenants in common. That the conveyance by James and Nancy Allen to said Shannon, as also all the subsequent conveyances, passed but an estate for the life of said Nancy.

“That under the judgment of said court said Joseph E. Blair obtained one-half of said lands, and that the title to said real estate has failed and been lost by a paramount title and by due course of law, and that the covenant of warranty in the deed of James and Nancy Allen has been broken.”

The complaint also alleges, “That after the death of said James and Nancy Allen, the defendant” (appellee) “as sole heir of said James and Nancy, took, received and appropriated to his own use, of moneys, effects and property of said James, to the amount of ten thousand dollars, and holds the same subject to the payment of said James’ debts. That the estate of said James has been fully administered,” etc.

“That appellant was not disturbed in his possession of said real estate and said covenant of warranty was not broken until September, 1873, after the final settlement of the estate of said James.”

The defendant demurred to the complaint for want of sufficient facts. And the demurrer was sustained by the court, to which the appellant excepted.

Judgment was rendered on demurrer, and appellant appeals to this court.

The appellee thinks that the covenants in the deed, made an exhibit in the complaint, are merely personal covenants and do not run with the land. We are of a different opinion. See *Coleman v. Lyman*, 42 Ind. 289, and cases there cited; also, *Spencer’s case*, 5 Co. 16; *Kingdon v. Nottle*, 4 M. & S. 53; *Willard v. Tillman*, 2 Hill, (N. Y.) 274; *Brady v. Spurck*, 27 Ill. 478; *Brown v. Metz*, 33 Ill. 339; *Harding v. Larkin*, 41 Ill. 413.

Blair v. Allen.

Boyd v. Longworth, 11 Ohio, 235, cited by appellee, does not support his views.

The appellee also insists that the complaint fails to show a paramount, outstanding title, against the covenantors. We are of a different opinion. The allegation as to that is sufficient.

That the averment of the breach of the covenant is not sufficiently alleged in the complaint, is another point made by appellee. The breach is as broad as the covenant:—this is sufficient. *Van Nest v. Kellum*, 15 Ind. 264.

The appellee further objects to the complaint, because it does not aver that he had notice of the suit of eviction in Kentucky. It is not necessary he should have had such notice. *Rhode v. Green*, 26 Ind. 83. The record of that suit is matter of evidence, not of pleading. What it is worth as evidence is a question not before us, and therefore not decided.

Again: It is urged against the complaint that it contains no averment that the appellant ever had possession of the land. Such an averment is not necessary. See the authorities, *supra*.

The final objection made to the complaint by the appellee is, that the covenants of Nancy Allen—she being a married woman—are void. True; but this will not relieve her husband, James Allen, nor his representatives, against his covenants; besides, the representatives of Nancy Allen are not sued.

There is another question, however, the decision of which is necessary to the proper understanding of the case. By the statute concerning the alienation of real estate, 1 R. S. 1876, p. 361, sec. 10, it is enacted that “Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement, shall be answerable upon such covenant or agreement to the extent of property descended or devised to them, and in the manner prescribed by law.”

Blair v. Allen.

One of the modes prescribed by law is found in section 62, 2 R. S. 1876, p. 512, which requires a succinct statement of every claim to be filed in the office of the clerk, within one year from the date of the appointment of an executor or administrator, or no cost shall be recovered; and if "not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of the liabilities of heirs and devisees."

And in case of the liabilities of heirs and devisees, it is subsequently provided, by section 178, 2 R. S. 1876, p. 554, that "The heirs, devisees and distributees of a decedent, shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed."

The complaint in this case contains no averment that the claim was ever filed under section 62, nor that the creditor was insane, an infant, or out of the State. A construction has been given to these sections by numerous decisions of this court. *Yoast v. Willis*, 9 Ind. 548; *Freeman v. The State, ex rel., etc.*, 18 Ind. 484; *Hartman v. Lee*, 30 Ind. 281; *Ratcliff v. Leunig*, 30 Ind. 289; *The Northwestern Conference of Universalists v. Myers*, 36 Ind. 375; *Wilson v. Davis*, 37 Ind. 141; *The Cincinnati, etc., R. R. Co. v. Heaston*, 43 Ind. 172; *Ginn v. Collins*, 43 Ind. 271; *Rinard v. West*, 48 Ind. 159.

In the case of *Freeman v. The State, ex rel., etc.*, *supra*, it was decided that the heirs of a decedent are not liable to the payment of his debts to the extent of property received by them from him, unless the creditor shall assert his claim within the time, and in the manner, prescribed by section 178, *supra*.

In *The Cincinnati, Richmond and Fort Wayne R. R. Co. v. Heaston*, *supra*, David Heaston, made his promissory note to the railroad company, for fifteen hundred dollars,

Blair v. Allen.

dated March 16th, 1864, payable upon the condition that "said road is put in running order to Winchester on or before the 1st day of September, A. D. 1872," etc. David Heaston died in 1865. His estate was finally settled in 1869. The railroad company did not file the note as a claim against his estate under section 62, *supra*, but, after the estate had been settled, sued the heirs of Heaston on the note. It was held that the railroad company was barred by section 178, *supra*. In this case, it will be observed that it was in the power of the payee to make the note payable at any time after it was made, by putting the road in running order to Winchester; and there was a time expressed in the note beyond which it never could become due, unless the road had been so put in running order.

In the case we are considering, the obligation could not arise until after the death of Nancy Allen,—an uncertain event, over which the vendees had no control,—nor until after the title warranted had been lost by reason of a superior title, and by due course of law, which were also events over which the vendees had no control, and which did not take place until after the estate of James Allen had been finally settled. It is very certain, then, that the appellee could not have complied with section 62, *supra*, by filing his claim in the clerk's office, nor brought himself within section 178, *supra*, by commencing his suit within one year after certain disabilities were removed. His claim did not accrue in time to file it under said section 62, and he labored under none of the disabilities mentioned in said section 178. The question, therefore, is forced upon us, whether, after lineal and collateral warranties have been abolished by section 10, *supra*, and no obligation especially prescribed by law to take their place, the appellee has any remedy at all. Upon full and careful consideration, we have come to the conclusion that the legislature could not have meant to leave a meritorious class of rights without remedies for their breach. The opposite conclusion, in cases

Ex Parte Simpson, Administrator.

like the present, would very much impair the faith and weaken the force in warranties of land titles, and become a frightful source of uneasiness to otherwise peaceable possession. We must conclude, therefore, that when, from the nature of the claim, the creditor can not comply with said sections 62 or 178, the heir, devisee or distributee shall be liable, on the covenant or agreement of the decedent, to the extent of the property received by him from the decedent's estate. The law does not require that to be done which can not be done; and no one shall lose his remedy for not doing what can not be done.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.

EX PARTE SIMPSON, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Removal of Administrator.*—*Failure to Except.*—*Supreme Court.*—*Practice.*—If no exception be taken to the summary order of court, removing the administrator of an estate of which such court has jurisdiction, and directing that he forthwith account for and pay over the assets of such estate, he will be deemed, on appeal by him to the Supreme Court, to have acquiesced therein.

From the Crawford Circuit Court.

A. J. Simpson, for appellant.

WORDEN, C. J.—At the June term of the court below, for the year 1874, it was decreed by the court that said administrator be cited to make and file his report on the first day of the next term of the court, exhibiting the condition of the estate in his hands. A citation was accordingly issued, and served on him. No report, however, seems to have been made at the next term, held in September of that year, but it was then ordered that the

Stephenson v. Feezer et al.

administrator make his final settlement of the estate by the next following term of the court, or appear and show cause why settlement thereof could not be made; and it was further ordered, that, in default thereof, said administrator be removed.

At the next following term, the record recites that the administrator appeared and filed his affidavit for a postponement of final settlement; but the court deeming the affidavit insufficient, as we suppose, ordered "That said administrator be and is hereby removed from his trust as such administrator, and that he forthwith account for and pay into court the assets of said estate, in his hands."

From the above order the administrator has appealed to this court, but as no exception whatever was taken to the order in the court below, he must be deemed to have acquiesced in it.

The judgment below is affirmed, at appellant's costs.

Petition for a rehearing overruled at the May term, 1877.

STEPHENSON v. FREEZER. ET AL.

CONVERSION.—*Bailee.—Promissory Note.*—A., being indebted to B. in a certain sum, delivered to the latter, as security for the payment of such debt, a promissory note secured by a chattel mortgage, held by A. against C., for a sum exceeding the amount of such debt; C., with knowledge of the nature of B.'s title to such note, having paid him thereon a sum equal to such debt, the latter surrendered such note and released such mortgage to C., who destroyed them, whereupon A. brought suit against both for conversion.

Held, that B. and C. had unlawfully converted such instruments, and are jointly liable therefor to A.

From the Boone Circuit Court.

J. A. Abbott, S. L. Hamilton, A. J. Boone, R. N. Harrison and T. J. Terhune, for appellant.

Stephenson v. Feezer et al.

C. C. Galvin and C. S. Wesner, for appellees.

BIDDLE, J.—The appellant sued the appellees for the wrongful conversion of a promissory note, made by John C. Feezer to Charles N. Kellogg, on the 29th day of September, 1873, payable one year after date, for four hundred dollars, with interest at ten per cent., and five per cent. attorney fees, secured by a chattel mortgage, and endorsed by Kellogg to the appellant. Trial and finding for the appellees; motion for a new trial overruled; exceptions; judgment; appeal. The only question in the case is, the sufficiency of the evidence to support the finding.

The appellant delivered the note and mortgage to the appellee Devol, as his bailee, who, upon the payment to him by Feezer, the other appellee, of one hundred dollars and fifty cents, surrendered the note and released the mortgage to Feezer, who was the maker, and who cancelled them by burning. Before the note was so delivered to Devol, thirty-five dollars had been paid and credited upon it, leaving a balance due upon the note of three hundred and sixty-five dollars, which was its value at the time, besides the accrued interest. So far, there is no dispute about the facts. On the part of the appellant, it is contended that he delivered the note to Devol, with the request that he should deliver it to the appellant's wife, as the appellant was about starting to Nebraska, and for no other purpose. Devol contends, that the note was delivered to him to secure him for what Stephenson owed him,—“To make him perfectly safe,” as he states in his testimony. He further states in his testimony:

“I did not pay him any thing for the note. He did not sell it to me. I did not pretend that it was mine. He did not authorize me to sell it—any further than he told me he wanted me to make myself safe out of it.”

Devol claimed, and so states in his testimony, that Stephenson owed him the one hundred dollars and fifty

Stephenson v. Feezer et al.

cents which Feezer, the maker of the note, paid him, at the time the note and mortgage were surrendered to Feezer and cancelled, but stated that:

“I afterwards found that there had been twenty-seven dollars and fifty cents’ worth of my goods, sold in the grocery, that I had not been paid for.”

These two amounts, making one hundred and twenty-eight dollars, is the entire amount claimed by Devol as due him from Stephenson. Feezer testifies that Devol came to him and said:

“That if I would pay him one hundred dollars and fifty cents, which Stephenson owed him, he would give me the note and enter satisfaction of the chattel mortgage, on the county records. I paid him, Devol, the one hundred dollars and fifty cents, and he gave me the note and mortgage, and entered satisfaction of the mortgage on the records, and I burned the note and mortgage.”

It is thus made plain, by their own testimony, that Devol cancelled the appellant’s note and mortgage, worth three hundred and sixty-five dollars, beside the interest upon it, for one hundred and twenty-eight dollars, at most, and that Feezer obtained the note from Devol, on which there was a balance due of three hundred and sixty-five dollars, with interest, for one hundred dollars and fifty cents,—well knowing, at the time, that the note was not the property of Devol, beyond the right to secure his own debt out of its proceeds. According to this state of facts, they both unlawfully converted the property of the appellant to their own use, and are liable. How, under such evidence, the court could find for the appellees, we cannot perceive. It is not a question of the weight of evidence,—for, give the testimony its full weight, according to the purport of its language, the case is against the appellees. *Spencer v. Morgan*, 5 Ind. 146; *Depuy v. Clark*, 12 Ind. 427.

The judgment is reversed, with costs. Cause remanded,

Burk et al. v. Hill.

with instructions to sustain the motion for a new trial, and for further proceedings.

BURK ET AL. v. HILL.

JUDGMENT.—Estoppel.—Married Woman.—Though the promissory note of a married woman, executed during her coverture, is void, yet if, in an action thereon, she make default and a judgment be rendered against her, she is forever estopped from denying or collaterally attacking it.

REAL ESTATE, ACTION TO RECOVER.—Sheriff's Sale.—Decree Against Married Woman.—If the real estate of a married woman be sold at sheriff's sale, on a decree rendered against her in an action upon a promissory note, and a mortgage on such real estate, executed by her during her coverture, and, on her failure to redeem the same, it be conveyed by the proper sheriff, to the purchaser at such sale, the latter may maintain an action to recover the possession of such realty from her.

SAME.—Evidence.—On the trial of such suit, evidence by the defendant, to show that she was a married woman at the time of the execution of such promissory note, is inadmissible.

SAME.—Pleading.—If, in an ejectment suit, the real estate in controversy be described in an exhibit attached to the complaint as part thereof, that is sufficient, though it be not described in the complaint itself.

SUPREME COURT.—Practice.—Waiver.—The failure of a party to an appeal to the Supreme Court, to refer in his brief to a question raised by his assignment of error, is deemed a waiver thereof.

From the Montgomery Circuit Court.

J. McCabe, P. S. Kennedy and W. T. Brush, for appellants.

W. P. Britton and M. W. Bruner, for appellee.

BIDDLE, J.—Complaint in two paragraphs, to recover the possession of land. The first paragraph is in the statutory form; the second sets forth the title of the complainant. Answer in general denial. Trial by the court, finding for appellee, and, over a motion for a new trial and exceptions reserved, judgment on the finding. Appeal.

55	419
135	62
136	185
55	419
137	63
55	419
147	699
55	419
156	571

Burk et al. v. Hill.

The sufficiency of the second paragraph of complaint is questioned by an assignment of error, but the question is not discussed in the briefs of the parties—indeed, it seems to be waived. We therefore dispose of it at once by holding the paragraph good.

The appellee, as against Matilda Burk, claims title to the land under a judgment and decree of foreclosure, founded upon a promissory note and mortgage made by the said Matilda and others, rendered on default, and a sale of the land, and sheriff's deed, to the appellee. In her defence, upon the trial, Matilda offered to prove by Myrick Smith, a competent witness, that she was, and for the last thirty years had been, the wife of Jeremiah Burk. To this evidence the appellee objected. His objection was sustained by the court, to which ruling he excepted and reserved his exception. The purpose of the evidence, doubtless, was, to show that Matilda Burk was a married woman at the time she made the note which is the foundation of the decree under which the appellee claims title, and, therefore, that the note was void. This raises the question as to the validity of a judgment against a married woman, founded on a note made by her during coverture, and is, indeed, the main question discussed by the parties in the case. ?

It is conceded that the note of a married woman is void. From this premise, the counsel for the appellants insist, that a judgment founded upon such note is also void. They reason thus:

“Then if her contract is void because she has no power to make a contract, how can her mere silence, when she is sued, make it valid, so as to enable the court to render a valid and binding judgment on it? If she can not, by a positive act, make a binding obligation, how can her mere passiveness, under any circumstances, give validity to her contracts? Can she bind herself and subject her property to sale by mere silence, when she can not do it by a positive declaration or a positive act?” * * *

Burk et al. v. Hill.

Again: "But a married woman, being incapable of making contracts, can not make a contract by admitting that she made it. It is absolutely void, because she has no power to make it, and neither she nor a court can breathe into it the breath of life. If a married woman can not make a valid contract, she can not, either by her action, or her confession, or her silence, invest a court with authority to make it binding by a judgment. The court can not render a judgment with only a blank piece of paper for its foundation. There must be some admission, to give validity to the contract before the rendition of the judgment on it; and surely such an admission by a married woman can not make the note valid, if her signature to it can not. If a note is void when a judgment is rendered on it, the judgment will be void also. The court can not metamorphose a void note into a valid judgment. It can not make something out of nothing."

This logic is ingenious, and may be sound, as between the parties, while the note remains merely a note; but it will not hold, against persons who have been defrauded by such a note, nor against the public faith, due to judgments solemnly rendered by courts of record, having jurisdiction over the person and the subject-matter. And it is true that the silence, admission or affirmance, in any way, by a married woman, of her void note, can not make it a valid note; but her silence, admission, or affirmance, when she is sued, and has the power to speak, admit, or affirm—as she has in this State—will transmute her void note into a valid judgment—and for two very essential reasons: *first*, that in such cases she is estopped by the judgment thus admitted, and can never afterwards gainsay it; and, *second*, because the public faith, for the security of person and property, requires that all judgments, sufficient on their face, shall import absolute, unquestioned and unquestionable verity. If the appellant should prevail in this case, on the argument of her counsel, she would perpetrate a palpable fraud; and once

Burk *et al.* v. Hill.

adopt what is contended for as a rule, and, instead of establishing rules of general justice, securing human rights, and upholding public faith, we should adopt a system of fraud, loosen all notion of right, and undermine public confidence in judicial proceedings. It is quite true, as the counsel say, that "The court can not render a judgment with only a blank piece of paper for its foundation;" but a void note is a very different thing from a blank piece of paper, and is a potent instrument in the perpetration of fraud. The one, on its face, is nothing but paper; the other, on its face, is a valid note. No eye can discover the defect. Its invalidity rests in the silence of the law, and can be known only to those who know the facts; and when the law calls upon the party who makes the note—fair upon its face—to state the facts, and they have the opportunity and the power to speak, they must speak, or forever hold their peace. The appellant in this case had this notice, had the opportunity and power to speak; she remained silent, allowed the judgment to go against her, with all the facts in her knowledge to prevent it, had received the consideration for the note, and, after the judgment, stood by, took no steps to prevent the sale, allowed the appellee to purchase the land, and thus invest his money therein, and now, years afterwards, when possession of the land is sought against her, says that the note she made was void! A system of judicature that would uphold such a transaction would render courts of justice machines of fraud.

The counsel for the appellants cite two cases in support of their views. The first is *Morse v. Toppan*, 3 Gray, 441. The whole of the opinion is expressed in the following words:

"SHAW, C. J.—The facts being agreed, they are to be taken as of the same legal effect, as if pleaded. The fact that the defendant was a married woman, when the judgment was rendered against her, would alone be a good bar to this action. It would be the same as if she had entered

Burk et al. v. Hill.

into an obligation by bond at the same time; to which she might have pleaded *non est factum*. A judgment is in the nature of a contract; it is a specialty, and creates a debt; and to have that effect, it must be taken against one capable of contracting a debt."

What induced a respectable court to pronounce such an opinion as this, or upon what ground it rests, is more than we know or can perceive. To us, to place a judgment upon no higher ground than an executory bond, to which *non est factum* might be pleaded, and to say that a judgment, to be obligatory, must be taken against one capable of contracting a debt seems to be legal absurdities. And the case cited in this opinion to sustain it gives it no support whatever. *Faithorne v. Blaquire*, 6 M. & S. 73. It was a case where the court, on motion, set aside a judgment on a warrant of attorney, given by a former court, although she had been divorced *a mensa et thoro*. This is quite different from attacking a judgment collaterally to defeat an action of ejectment.

The other case cited by the appellant is *Griffith v. Clarke*, 18 Md. 457, the ground of which was, that a married woman, in that State, was not competent to employ an attorney. And in this case, not a single authority is cited. It stands naked and alone.

The counsel also refer us to a decision recently made by the Supreme Court in Illinois, but they did not cite it by name or reference, and we are not able to find any thing of the kind. They also say:

"A judgment may be annulled, and execution upon it enjoined, when it was procured by fraud."

Certainly it may, but fraud, in the cause of action upon which it is founded, can not be pleaded against it,—it must be fraud in procuring the judgment; and for a very sufficient reason: because, in such a case, the fraud is not accomplished until the judgment is rendered. There is no analogy whatever between such cases and the one before us.

 Burk et al. v. Hill.

Upon the two cases cited, and the argument of the counsel, they ask us to overrule several well considered cases deciding the question here discussed. To sustain their views, we should not only have to overrule a number of established cases, which, in some instances, have become rules of property, but also to violate, in a greater or less degree, the principles upon which a long line of decisions, touching judgments, is founded, running through the entire history of the State. *Stare decisis et non quæritur moxere.* *Fischli v. Fischli*, 1 Blackf. 360; *Stipp v. The Washington Hall Co.*, 5 Blackf. 16; *Horner v. Doe*, 1 Ind. 130; *Laney v. Laney*, 4 Ind. 149; *Gatling v. Rodman*, 6 Ind. 289; *Barnes v. McKay*, 7 Ind. 301; *Arnold v. Stanfield*, 8 Ind. 323; *Spaulding v. Thompson*, 12 Ind. 477; *Wiesman v. Macy*, 20 Ind. 239; *Preston v. Sandford's Adm'r*, 21 Ind. 156; *Evans v. Ashby*, 22 Ind. 15; *Fletcher v. Holmes*, 25 Ind. 458; *Buell v. Shuman*, 28 Ind. 464; *Abdil v. Abdil*, 33 Ind. 460; *Comparet v. Hanna*, 34 Ind. 74; *Shumaker v. Johnson*, 35 Ind. 33; *Smith v. Dodds*, 35 Ind. 452; *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300; *Gavin v. Graydon*, 41 Ind. 559; *Wagner v. Ewing*, 44 Ind. 441; *Landers v. Douglas*, 46 Ind. 522; *Johnson v. Miller*, 47 Ind. 376; *McCaffrey v. Corrigan*, 49 Ind. 175; *Greenup v. Crooks*, 50 Ind. 410; *King v. Roe*, ante, p. —, and *Dandislet v. Benninghof*, ante, p. —.

The appellants urge several minor questions, such as, that it appears on the face of the complaint, that Matilda Burk was a married woman when she made the note; that the complaint does not describe the land, (but it is described in the mortgage, which is made an exhibit,) and therefore the court had no jurisdiction of the subject-matter of the suit; that the ejectment suit should have been enjoined on the complaint of the appellant; that the default in the judgment on the note and mortgage should have been set aside, and the appellant allowed to plead to the action; all of which fall within the main question we

McOske v. Burrell.

have decided, namely, that the judgment is valid on its face, and need not therefore be noticed in detail.

It is claimed, also, that the levy was excessive, that the property should have been sold in parcels, and that the evidence does not support the finding, as to damages; but we find no serious objection to the record on these points.

The judgment is affirmed, with costs.

55	425
131	145

MCOSKE v. BURRELL.

HIGHWAY.—Supervisor.—Watercourse.—Remedy.—Where, in the exercise of an honest, though an erroneous, judgment that it is necessary for the repair of a highway in his road district, a supervisor so constructs a dam that the flow of an ancient watercourse is thereby diverted from its original channel, in such manner as to overflow and damage the land of a neighboring proprietor, the remedy of the latter is, by an application for an assessment of his damages, under section 16 of the act of March 5th, 1859, in relation to supervisors, (1 R. S. 1876, p. 855) and not by an action against such supervisor, personally.

SAME.—Where, in such case, the lands of an adjoining proprietor are so injured, not because of the negligence of a supervisor in constructing such dam, but because of the failure of his successor to repair it, the former is not liable.

SAME.—When Supervisor is Liable.—Burden of Proof.—If in making such repairs a supervisor acts in bad faith, negligently or corruptly, he is liable, personally, to any such owner sustaining damages thereby; but the burden of proof is upon the latter to show such bad faith, negligence, or corrupt motive.

SAME.—Assessment of Damages.—Tender.—Constitutional Law.—The entering upon or taking of the property of another by a supervisor, as contemplated by such section 16 of the act in relation to supervisors, is a taking by the State, within the meaning of section 21, article 1, of the Constitution of this State, for which damages need not be first assessed and tendered.

NEW TRIAL.—Causes.—Time Given to File.—Waiver.—Practice.—Where, at the term at which a finding or verdict is rendered, an oral motion for a new trial is made, but, at the request of the party making such motion and without objection by the opposite party, time is given by the court, until the next term, to file written reasons in support of such motion, it is too late for the opposite party, at such subsequent term, to then object to the filing of such reasons.

McOsker v. Burrell.

From the Jackson Circuit Court.

D. H. Long, B. E. Long and E. C. Devore, for appellant.
B. H. Burrell and F. Emerson, for appellee.

PERKINS, J.—Suit by appellee, against appellant, for obstructing an ancient watercourse and diverting the course of the water, which obstruction and diversion caused an overflow of appellee's land, to his damage, etc.

The acts done are thus charged in the complaint:

"The plaintiff avers that the said defendant, without any right or authority from the plaintiff, or by lawful right or authority, did, on or about the 20th day of May, 1871, order, and ever since that time has maintained, a dam across the original channel of said creek, of logs, plank and earth, and thereby, and by digging a ditch, then and there, did divert the same from its original channel, and did change the channel of said creek, so that the water flowing through the same does, after passing over the defendant's premises, overflow, spread out over and upon the real estate of the plaintiff," etc.

The appellant answered the general denial, under an agreement between the parties, that any legal defence, which might exist, should be admissible under such denial.

The cause was tried by a jury, and the appellee obtained a verdict for fifty dollars, and, over a motion for a new trial, a judgment on the verdict.

The evidence is in the record.

It shows that the appellant was supervisor of the road district in which the dam was erected and the ditch dug, and that whatever he did in the premises he did in his official capacity, as such supervisor. It becomes necessary, therefore, that we ascertain whether the supervisor had power to do the acts complained of.

After highways have been constructed, so long as they are continued as such, they should be kept in repair; the supervisor takes an oath to so keep them, (sec. 5, 1 R. S. 1876, p. 856) and to carry into effect the orders of the

McOsker v. Burrell.

township trustee in regard to them. This must be done according to some prescribed plan.

The method in this State is prescribed by legislative act. Our statute (1 R. S. 1876, p. 859) provides that the township trustee shall annually assess a road tax, and that (p. 860) he shall order the expenditure of such tax in the improvement of highways, under regulations that he may make; that he shall pay over the money to the supervisor, taking from him a bond, to enable him to make the improvements, etc.; and the supervisor has power to call out persons liable to work on the highways, under the provision of the statute.

Section 16 of the statute, (p. 858) under which the acts complained of in this case were done, is as follows:

“The supervisor, or any other person by his order, may enter upon any land adjoining or near to any highway in his district, and thereupon construct such ditches, drains and dams, and dig and remove any gravel, earth, sand or stone, or cut and remove any wood or trees that may be necessary for the proper construction, repair or preservation of such highways, and any person aggrieved may petition the township trustee for an assessment of damages occasioned thereby, and in such case, such trustee shall appoint three disinterested persons, in such township, to view the locality where the grievance was committed, and assess such damages within twenty days after such appointment, they having taken an oath to faithfully discharge their duties, before some officer authorized to administer oaths, and such viewers shall make report thereof, within ten days after such assessment, to such trustee, having first given notice thereof to the complainant, and such trustee shall pay the damages assessed to be paid out of the township treasury, unless he should deem them unreasonable, in which case he may reduce the amount.”

This statute authorizes the supervisor to do just such acts as are charged to have been committed by the appel-

McOsker v. Burrell.

lant in this case; but the land on which he enters for the purpose of committing them, must be "adjoining or near to a highway in his district;" (the ownership of the land being immaterial) and the dams erected and ditches dug must "be necessary for the proper construction, repair or preservation of such highways." When such conditions exist, the supervisor may perform the acts, whether they damage any person or not. If they do cause damage, and the damage is of a character entitling the injured party to redress, the statute points out the mode in which it may be obtained. See *The Trustees of the Wabash and Erie Canal v. Spears*, 16 Ind. 441, and cases cited, as to what are such damages.

The statute in question has been held constitutional. It provides for the assessment of damages for property taken, etc., and the payment of compensation, but does not require prepayment, because this class of cases falls within the exception contained in section 21 of article 1 of the Constitution, which section ordains that "No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." *The Jeffersonville, etc., R. R. Co. v. Daugherty*, 40 Ind. 38; *Hymes v. Aydelott*, 26 Ind. 431.

A supervisor, acting within the scope of his authority, in good faith, should not be liable to an action in his natural capacity for acts so done in his official capacity. He should not be liable for acting upon an honestly entertained, erroneous opinion in these matters. *Carter v. Harrison*, 5 Blackf. 138; *Boyd v. Blaisdell*, 15 Ind. 73, note on page 76; *Conwell v. Emrie*, 4 Ind. 208.

It seems to us, that in cases growing out of acts done under this statute, where the party claiming to be injured declines to avail himself of the statutory mode of recovering his damages, but elects to sue the supervisor and hold him personally liable, the burden should rest upon the party so suing, of establishing the facts that the super-

McOsker v. Burrell.

visor did not act in good faith, but acted without reasonable care, or corruptly, or maliciously. The supervisor is bound, under penalties, to act;—to act upon his own judgment, in matters, some of which are *quasi judicial*, and it would be unjust, under such circumstances, and against public policy, to hold him liable for a mere error of judgment.

The evidence in this case shows that the appellant did act in good faith.

If the ditch and dam were properly constructed, and, by reason of not being kept in proper condition by succeeding supervisors, subsequently worked injury to the appellee, the appellant should not be held liable for such injury. We think the evidence makes no case against the appellant.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

PERKINS, C. J.—A petition for a rehearing is filed in this case. The rehearing is asked on two grounds:

1st. The written reasons for a new trial were not filed at the term at which the verdict was rendered; and,

2d. The defendant was not supervisor, at the time he committed the act complained of.

The record shows that the verdict was returned at the April term; it states, that, at that term, a motion for a new trial was made, and leave given by the court to file the written motion and reasons at the next, the September, term. No objection or exception appears to have been taken to this action of the court at that term. At the September term, pursuant to said leave, the written motion and reasons were filed, over the objection of the appellant.

The statute requires the motion for a new trial, and the reasons therefor, to be filed at the term the verdict or

The Indianapolis, P. & C. R. W. Co. v. Crane *et al.*

finding is rendered. Can time be given for this filing, by the court, till the succeeding term, by the consent of both parties, where the motion is orally made at the term at which the verdict or finding is rendered? It seems to us that it can be. This being so, where the oral motion is made and leave given in open court, and no objection made, at the term of the return of the finding or verdict, we think consent is to be presumed, and that the written motion and reasons may be filed at the next term, within a reasonable time, where no day for filing is fixed by the court in the leave granted, and on or before that day, where a day is designated in the leave granted. *Wilson v. Vance, ante*, p. 394. .

The jury answered, specially, that the defendant was supervisor, when the acts complained of were done.

The petition for a rehearing is overruled.

Petition for a rehearing overruled, and the opinion thereon filed, at the May Term, 1877.

THE INDIANAPOLIS, PERU & CHICAGO R. W. Co. v. CRANE
ET AL.

SUPREME COURT.—Practice.—Waiver.—The failure of a party, on appeal to the Supreme Court, to discuss in his argument a question made in the record, is deemed to be a waiver thereof.

SAME.—Weight of Evidence.—The Supreme Court, on appeal, will not reverse a judgment on the mere weight of evidence.

From the Laporte Circuit Court.

D. Moss, for appellant.

A. T. Bliss, for appellees.

Howk, J.—The appellees, as plaintiffs, sued the appellant, as defendant, before a justice of the peace of Laporte county, Indiana, to recover damages for an alleged breach, by the appellant, of a contract of affreightment.

The Indianapolis, P. & C. R. W. Co. v. Crane *et al.*

Appellees' complaint was in two paragraphs, but each of them counted upon the same cause of action. In the first paragraph of their complaint, the appellees alleged, in substance, that the appellant was a common carrier for hire; that about the 2d day of September, 1872, the appellees delivered to the appellant, as such common carrier, at Plymouth, Indiana, a station on the line of its railway, in good order and condition, five packages of American Russia sheet-iron, of a specified weight, and of the value of two hundred dollars, owned by the appellees, which sheet-iron the appellant then and there undertook, promised and agreed, as such common carrier for hire, to safely transport and carry, in good order and condition, from said station, to the city of Laporte, Indiana, and there deliver the same, in like good order and condition, to appellees; and a copy of said undertaking was filed with and made part of said complaint; for which transporting and carrying, appellees promised and agreed to pay to appellant a reasonable compensation; and the appellees alleged, that appellant did not safely, and in good order and condition, transport and carry said iron, from said station, to said city of Laporte, and there deliver the same, in like good order and condition, to the appellees; but that, on the contrary, the appellant so negligently and carelessly cared for, handled, transported and carried said iron, and so exposed the same, that said iron became and was thereby moistened, corroded, rusted, spotted and stained, and was thereby damaged in its value, to wit, in the sum of one hundred and fifty dollars; and the appellees averred, that by reason of the premises they had been damaged in the sum of one hundred and fifty dollars, for which sum, and other proper relief, they demanded judgment.

The written undertaking of the appellant, a copy of which was filed with and made part of the complaint, was a receipt, in these words and figures:

The Indianapolis, P. & C. R. W. Co. v. Crane *et al.*

“PLYMOUTH STATION, September 2d, 1878.

“Received of the Penna. R. R. Co., lessee of the Pittsburgh, Fort Wayne and Chicago Railroad, in good order, the packages of merchandise charged in column of articles opposite our names. Pittsburgh Way-bill No. 5,280, dated August 29th, 1872. P. for car 444, L. & B. F. Crane, 5 packages iron, 1,141 lbs., Laporte, Indiana.

(Signed)

“J. C. JILSON,

“Ag’t I., P. & C. R’w’y.”

The second paragraph of the complaint was identical with the first paragraph, except that it contained no reference or allusion whatever to the receipt or any written undertaking.

There was a trial by the justice, and judgment for the appellees, from which the cause was duly appealed to the court below.

In the latter court, there was a trial by jury, and a verdict was returned for the appellees for two hundred and twenty-eight dollars and twenty cents, of which appellees entered a *remittitur* of seventy-eight dollars and twenty cents, leaving a balance of one hundred and fifty dollars, of said jury’s verdict.

Upon written causes then filed, the appellant moved the court below for a new trial, which motion was overruled, and the appellant excepted. And judgment was rendered by the court below, upon the verdict, for one hundred and fifty dollars and costs, from which this appeal is now here prosecuted.

In this court, the only alleged error, assigned by appellant, is, that the court below erred in overruling appellant’s motion for a new trial. Several causes for a new trial were specifically assigned, in appellant’s motion for that purpose. But the only question discussed by appellant’s attorney, in his argument of this cause, is a question as to the weight of the evidence. However weak some of the evidence may have been, and although we, as triers of the facts, might possibly have reached a very different

Stilwell, Adm'r's, et al. v. Corwin, Adm'r.

conclusion, from the evidence, to that which the jury reached, yet, as there was evidence, introduced on the trial, tending to support each material point in the appellees' case, we can not disturb the verdict, and the judgment of the court below thereon, on the mere weight of the evidence. This has been so often held by this court, that the rule needs no citation of authorities to support it. The reasons for the rule are stated, clearly and explicitly, by BIDDLE, J., in the case of *Cox v. The State*, 49 Ind. 568, and it would be useless to repeat them here.

In accordance with the well established practice of this court, in civil causes, we consider all questions, made in the record, to be waived by the appellant, if he fails to notice or discuss them, in his argument of the cause. We find no error in the record.

The judgment of the court below is affirmed, at appellant's costs.

. Petition for a rehearing overruled at the May Term, 1877.

STILWELL, ADM'R'S, ET AL. v. CORWIN, ADM'R.

CONTRACT.—Assessment of Taxes.—Contract to Avoid.—Fraud.—To the complaint in an action upon a written instrument executed by the defendants, acknowledging the receipt of, and promising to return to the plaintiff, a certain sum in United States seven-thirty bonds, the defendants answered, admitting the execution of such instrument, but averring, that, at the date thereof, the plaintiff had had on deposit, in a bank of which the defendants were officers, a sum in currency equal to the amount mentioned in such receipt; that in order to fraudulently avoid taxation on such currency, the plaintiff surrendered his certificate, evidencing such deposit, and, in lieu thereof, received the instrument in suit, though no such bonds were ever received as therein recited.

Held, on demurrer, that such answer is insufficient.

Held, also, that an intent to so avoid taxation is not fraudulent.

Stilwell, Adm'r's, et al. v. Corwin, Adm'r.

From the Madison Circuit Court.

M. S. Robinson and J. W. Lovett, for appellants.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

BIDDLE, J.—This action is brought by John E. Corwin, administrator of the estate of Allen Makepeace, deceased, against Eliza M. Stilwell, administratrix *de bonis non* of the estate of Jacob G. Stilwell, deceased, and Winnifred C. Stilwell, administratrix of the estate of Thomas N. Stilwell, deceased. The complaint contains two paragraphs. The first is founded on the following writing, alleged to have been executed by Jacob G. Stilwell and Thomas N. Stilwell, viz.:

“Received of Allen Makepeace, for safe-keeping, fourteen thousand five hundred dollars, in seven and three-tenths United States bonds; said bonds to be returned to said Makepeace, at any time called for. Interest on said bonds due August 15th and February 15th. Anderson, Indiana, December 28th, 1865.

(Signed)

“J. G. & T. N. STILWELL.”

The second paragraph of the complaint is a common count, upon an alleged indebtedness for money had and received.

The first paragraph of answer pleaded by the defendants, to the first paragraph of the complaint, is as follows:

“That they admit the execution of the written instrument which is the foundation of said paragraph, and they say it was executed under the following circumstances, and as a part of the following contract, and not otherwise, to wit: On the 28th day of December, 1865, the said defendants owned and operated the Citizens Bank, which was a bank of deposit, and one of general banking business, at that time, and had been for ten years prior thereto, at Anderson, Indiana; that the officers of said bank were Jacob G. Stilwell, who was president thereof, and Thomas N. Stilwell, who was cashier of the same. That prior to

Stilwell, Adm'r'r, et al. v. Corwin, Adm'r.

and on the day last aforesaid, the said plaintiff had been and then was a depositor in said bank, and had full knowledge of its being such a bank. That on said day said plaintiff, who was then and has since continued to be a resident of Madison county, Indiana, had, in said bank, deposited fourteen thousand and five hundred dollars in currency, which was subject to taxation for Government, State and county purposes, and that, to enable him to avoid paying taxes on the same, for the next then ensuing year, to wit, the year of 1866, it was, at the instance and request of said plaintiff, by said parties agreed that said certificates of deposit of said fourteen thousand five hundred dollars should be, by these defendants, received from said plaintiffs, and the same should be cancelled and destroyed, and the said bank and these defendants absolved from all liability by reason of said deposit, and that these defendants, in lieu thereof, should execute the said written instrument in suit, which should not be subject to taxation for said Government, State and county purposes, and thereby enable said plaintiffs, fraudulently, corruptly and illegally, to avoid the listing for purposes of taxation, of 'money on deposit,' in his schedule of property, money, etc., held by him, the said plaintiff, on the 1st day of January, 1866, and to thereby enable him, said plaintiff, to avoid the payment of taxes on said sum of fourteen thousand five hundred dollars, due the Government, State and county as aforesaid, to wit, to the State and county aforesaid the sum of two hundred and ninety dollars, and to the Government of the United States in the sum of fifty-three dollars; and they say that in pursuance of said agreement the said plaintiff did refuse to list for purposes of taxation the said sum of fourteen thousand and five hundred dollars for the year 1866, and did, by virtue of and in pursuance of said agreement, fraudulently, corruptly and illegally avoid the payment, for the year 1866, of any and all taxes on said fourteen thousand five hundred dollars; and they further say that no bonds of any

Stilwell, Adm'r'r, *et al.* v. Corwin, Adm'r.

kind or description whatever passed from the said plaintiff, to the said defendants, on that occasion, nor to any other person for them. That there were no bonds in said contract, or connected in any manner with the said written instrument, and that the same was executed as aforesaid, to enable said plaintiff to cheat and defraud the said State of Indiana, the said county of Madison, and the said Government of the United States, out of the moneys due them, respectively, from said plaintiff, and for no other purpose whatever; and that the contract is illegal and void, and they demand judgment for costs," etc.

The second paragraph of the answer is not substantially different from the first.

The fourth paragraph avers that the cause of action set out in the first and second paragraphs of the complaint are one and the same, and then alleges the same facts that are set up in the first and second paragraphs, only in a slightly different form.

To each of these paragraphs of answer a demurrer was filed, alleging, as ground, the insufficiency of the facts therein stated, to constitute a defence. These demurrers were sustained, and exceptions reserved. Issues of fact were formed upon other paragraphs of answer, trial, verdict, and other proceedings had, which resulted in a judgment against the appellants. These proceedings need not be more particularly stated, as the only questions discussed by the appellants in their brief arise upon sustaining the demurrers to the first, second and fourth paragraphs of the answer.

It is insisted by the appellants that the agreement, set out in the first paragraph of the complaint, was made for the purpose of avoiding the payment of taxes for the year 1866, on money on deposit in the Citizens Bank, as alleged in the first paragraph of their answer, and, therefore, that it is fraudulent and void; and, also, that the agreement, for the same reasons, is void, as being against public policy.

Stilwell, Adm'r's, *et al.* v. Corwin, Adm'r.

We can not perceive wherein the agreement is void for either cause. Any person has a right to exchange money on deposit in a bank for bonds on the United States, at any time, even if the express purpose in the transaction was to exchange money which was taxable, for bonds which were not taxable. Nor would the destruction of the certificates of deposit make the slightest difference, for they would be cancelled by the exchange. The money given for the bonds was taxable for the year 1866, either in the hands of the Stilwells or in the hands of Makepeace. The revenue, therefore, is not defrauded. And, although no bonds actually passed in the transaction, yet if Makepeace chose to take the obligation of the Stilwells for the delivery of bonds, instead of the bonds themselves, it will not change the character of the transaction.

The allegations in the first paragraph of answer amount to no more than that Makepeace fraudulently refused to list his money, on deposit in the Citizens Bank, for the year 1866, and thereby fraudulently avoided paying the tax thereon for that year. These facts constitute no answer to the obligation against the Stilwells to deliver United States bonds to Makepeace, according to the terms of the written instrument set out in the complaint, even though they assisted him in the fraud, as alleged.

As the second and fourth paragraphs of the answer are the same, in effect, as the first, they need not be separately examined.

The judgment is affirmed, with costs.

Bartel v. Tieman et al.

BARTEL v. TIEMAN ET AL.

CONTINUANCE.—Absence of Witness.—Absence of Attorney.—The absence of a witness in a cause, or of an attorney regularly employed to conduct such cause, without the fault of the applicant, is, upon filing a sufficient affidavit, a good cause for a continuance.

SAME.—Supreme Court.—The action of the circuit court, in refusing to grant a continuance of a cause, is subject to review by the Supreme Court on appeal, and, if erroneous, it is sufficient cause for the reversal of a judgment rendered in such cause, against the applicant for such continuance.

SAME.—Bill of Exceptions.—Extrinsic Facts.—If the action of a court, in refusing to grant a continuance of a cause, has been influenced by facts outside of those stated in the affidavit, therefor, they must, to be made available to sustain such decision on appeal to the Supreme Court, be set out in the bill of exceptions.

From the Wayne Circuit Court.

H. C. Fox and *H. B. Payne*, for appellant.

W. A. Bickle and *C. H. Burchenal*, for appellees.

PERKINS, J.—The appellee Tieman commenced suit in the Wayne circuit court, against the appellant and the other appellees, to collect money due on promissory notes, and to set aside alleged fraudulent conveyances of real estate.

On the 27th day of November, 1874, as appears by the record, the appellee Tieman filed his amended complaint. Demurrer, answers and cross-complaint followed; the cause progressed to issue for trial, and, on the 14th day of June, 1875, it was called for trial; whereupon the appellant moved for a continuance of the cause, on an affidavit showing these facts, viz.:

“That the cause was set down for trial on the 9th day of this month, (June,) and that she was ready for trial on that day; that she had procured the attendance of a very important witness, who lived in Cincinnati, Ohio; that she had, some time before, employed Henry C. Fox and John H. Popp, attorneys, to prepare and conduct her defence in said suit; that they had prepared themselves to

Bartel v. Tieman et al.

defend it, and were familiar with the facts and questions involved in it, and that she relied upon them to represent her; that said cause was not called in its order for trial until the evening of the 10th instant, at which time she was ready for trial, with her attorneys; that the court passed said cause and called another one, and proceeded to the trial of it, whereupon her witness from Cincinnati immediately left for his home in that city. Affiant further says, that her attorneys, who were then present, ready for trial, can not be present at this trial, at this term, owing to professional engagements elsewhere, which engagements were entered into before the time set for the trial of this cause, viz., the 9th instant; that they informed her of this fact, for the first time, on the 12th instant; that she has not employed other counsel, for the reason that no others were familiar with the facts of her defence, and that, after she was informed by her retained counsel that they could not be at the trial on this day, the intervening time, being but two days, was too short to enable other attorneys to familiarize themselves sufficiently with the case, to properly try it; and for the further reason that she is poor, as is also her husband, and unable to pay two sets of attorneys; that in the complaint she is charged with fraudulently receiving the title to lands therein described, with intent to cheat, hinder and delay the creditors of her husband, all of which charges are untrue; that all she has for herself and children is involved, and it is of the greatest importance to her to have her said witness, on the trial.

“Affiant further says, that her most important witness is one George Reitman, of Cincinnati, Ohio; that he was present, at the time this cause was set for trial and was passed by the court; that she had him summoned to attend at this time before he left; that she expects to prove by said witness that said property was purchased by her in good faith, and that she obtained one thousand two hundred and fifty dollars of him, and gave him a mortgage

Bartel v. Tieman et al.

to secure the same, all of which was done without any fraudulent intent; that after said cause was passed, as hereinbefore stated, said witness returned to Cincinnati, but, before he started, her counsel proposed to the opposite side to take his deposition, but they would not consent; that she can not prove the same facts by any other witness; that if this cause is continued, she can procure his testimony at the next term; that his absence is not by her procurement or connivance, and that the facts she expects to prove by said witness are true.

“SOPHIA BARTEL.”

The affidavit was duly sworn to. The continuance was refused. Trial. Final judgment against appellant, over a motion for a new trial.

It was early settled in this State, that a refusal to continue a cause, where a continuance ought to be granted, is error; that the appellate court will review the exercise of discretion in such cases, in the lower court. *Vanblaricum v. Ward*, 1 Blackf. 50; *Fuller v. The State*, 1 Blackf. 63.

This being so, we think this cause must be reversed. This court can look only to the facts stated in the bill of exceptions, in passing upon the question of discretion in the refusing of the continuance. If facts outside of those stated in the affidavit for a continuance influenced the action of the court below in the premises, the court should have taken care to have them stated in the bill of exceptions.

The judgment is reversed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

Webb v. The Brandywine Junction Turnpike Company et al.

WEBB v. THE BRANDYWINE JUNCTION TURNPIKE COMPANY
ET AL.

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TURNPIKE.—Gravel Road.—Repeal of Laws.—Assessment.—Lien.—Remedy.

—By the enactment of the act of March 13th, 1875, (Acts 1875, Reg. Sess., p. 80) repealing the act of May 14th, 1869, (3 Ind. Stat., p. 538) authorizing the making and collection of assessments on lands, to aid in the construction of plank, macadamized and gravel roads, not only the remedy for enforcing the collection, but also the lien, of assessments made for such purposes under the latter act, is taken away.

SAME.—Assessors.—Authority.—Appointment.—The act of March 11th, 1867, (Acts 1867, Reg. Sess., p. 167) authorizing the assessment of lands to aid in the construction of gravel roads, was repealed by the act of May 14th, 1869, (3 Ind. Stat., p. 538) in relation to the same subject, and, therefore, assessors appointed under the former act could not, after the enactment of the latter, without a reappointment, make either a valid assessment or a correction of a former but defective one made by them.

SAME.—Number of Assessors.—Neither the act of March 11th, 1867, nor that of May 14th, 1869, in relation to such assessments, authorized the making of any such assessment, in any one proceeding, by more than three assessors, and therefore any such assessment, made by more than three assessors, was void.

SAME.—Amending Report of Assessment.—By Whom Done.—Where, under such latter act, in making an assessment for the construction of a gravel road, a portion of the lands subject thereto were omitted, the original assessors only, and not partially or entirely different ones, could, under the order of the proper county board, complete such assessment.

From the Shelby Circuit Court.

O. J. Glessner, S. Major and A. Major, for appellant.

B. F. Love, T. W. Woollen and A. C. Downey & Sons, for appellees.

Howk, J.—On the 1st day of August, 1871, the appellant commenced this action against the appellees, in the court below. The relief sought for by the appellant, in his complaint, was to perpetually enjoin the appellees from collecting any part of a supposed assessment on the lands of appellant, made under the provisions of the act authorizing the assessment of lands for plank, macadamized and gravel road purposes, etc., approved May 14th, 1869, (3 Ind. Stat., p. 538) and from levying upon any

Webb v. The Brandywine Junction Turnpike Company et al.

property of the appellant to satisfy the same, and for other proper relief.

The causes relied upon by appellant, in his complaint, for obtaining the desired relief, may be summarized as follows:

It was alleged, among other things, that the appellee Fountain G. Robertson, who was one of the assessors in making the assessment of benefits complained of by the appellant, at the time of his appointment as such assessor, was and ever since had been, and was then, the treasurer of said Shelby county; that on March 10th, 1869, the assessors of benefits met at the place appointed, and took the required oath, and afterwards, on the — day of —, 1869, said assessors, without viewing or making a list of all the lands within one and one-half miles on either side of said proposed road, and within the same distance of either end thereof, made a list and an assessment of only part of the lands within said distance, and on June 10th, 1869, reported the same in writing to the county auditor; that appellant was a resident freeholder of said county, whose lands were within one and one-half miles of said proposed road; that by said assessment, there was assessed against appellant's lands the sum of six hundred and twenty-three dollars, a copy of which assessment against him was filed with his complaint; that certain lands, belonging to certain named persons, lying within one and one-half miles of said proposed road, a description of which was filed with the complaint, were omitted wholly from the said list and assessment of said assessors; that when said assessment was made and reported to said auditor, the line of said proposed road had not been permanently located, as required by law; that afterwards, on the — day of —, 1869, said county auditor put upon the tax duplicate of said county, for 1869, one-sixth part of the assessment returned against appellant by said assessors, as a lien upon the lands so assessed, and on the — day of —, 1870, said auditor put one-sixth part more

Webb v. The Brandywine Junction Turnpike Company et al.

of said assessment on said duplicate, for 1870; that said duplicate was then in the hands of appellee Robertson, as treasurer of said county, who was threatening to enforce the collection of said assessment, as other taxes against real estate were collected upon default of payment; and appellant averred, that said assessment, and the proceedings of said board of commissioners authorizing the same, were void, for the following reasons:

1st. Because said order of said board did not show that said company was a duly organized corporation, under the act authorizing the construction of plank, macadamized and gravel roads, approved May 12th, 1852; nor did the petition of said company to said board, or said order, show under what act, if any, said company was attempted to be organized, or that said company was organized to construct or own a plank, macadamized, gravel, clay or dirt road, or for what purpose it was organized; nor did said petition, or the finding or order of said board, show that said proposed road, or any part thereof, was located within Shelby county, Indiana, or that the lands, within one and one-half miles of the line of said road, were situated in said county and State: and therefore said board of commissioners had no jurisdiction to grant the relief prayed for in said petition, or to appoint assessors to make said assessment:

2d. Because said order of said board did not show that said assessors were disinterested freeholders of said county, and because said Robertson, when he made said assessment, was the authorized and acting treasurer of said county:

3d. Because said company did not permanently locate the line of said road, previous to the making and reporting of said assessment:

4th. Because said assessors failed and refused to properly discharge their duties, in omitting to view and make a list of all the lands, within one and one-half miles of either side, or either end of said proposed road: and,

Webb v. The Brandywine Junction Turnpike Company *et al.*

5th. Because said assessment list was vague and uncertain as to the description of lands, and did not show that it contained all the lands within the limits prescribed by law, or that the assessors viewed any of the lands they assessed, or that the lands they assessed were situate in said county, nor did it sufficiently show for what road said benefits were assessed.

The complaint was duly verified by appellant, and a temporary restraining order was made thereon, until the further order of the court below. At the April term, 1872, appellee The Brandywine Junction Turnpike Company answered the complaint, and a change of venue was then granted from the regular judge of the court below. Owing, apparently, to the difficulty of getting another judge, no further steps were taken in the cause until in April, 1873, when a special term of the court below, for the trial of this cause, was held by the judge of the ninth judicial circuit. At which time, the appellees filed what was termed a second additional paragraph of their answer to appellant's complaint, except as to the costs then accrued.

In this answer, appellees said, in substance, that they admit the organization of said turnpike company, under the said corporate name, the petition to and order of the board of commissioners of said county appointing said assessors, their qualification and assessment, and the placing of said assessment on the tax duplicate and in the hands of the treasurer of said county for collection, as shown in the exhibits filed with the complaint,—except that they aver, that the lands marked “No benefits” were viewed and listed by said assessors, and that said assessors determined on such view that no benefits would result to such lands from the construction and maintenance of said road, and so reported in and by said words, “No benefits;” but the appellees say, that said road was, at the time said assessment was made, and ever since has been, located wholly in Shelby county, Indiana; that there

Webb v. The Brandywine Junction Turnpike Company *et al.*

were no lands, in said county, within one and one-half miles of said road, on either side thereof, and within like distance of either end thereof, purposely omitted by said assessors in said assessment, or any partiality or favor shown in said assessment; that immediately after the return of the assessment list of said assessors, said turnpike company proceeded, upon the faith of said assessment and that the same would be paid at its maturity, to construct said road, and to borrow money with which to construct said road, and necessarily expended in such construction the sum of — dollars, being more than the whole assets of said company from all sources, including said assessment; that of said indebtedness there is due and unpaid the sum of — dollars; that all the moneys and means of said company have been exhausted in the construction of said road, except that portion of said assessment yet unpaid, being the sum of — dollars, including the assessment the appellant seeks to enjoin the collection of in this suit; that said assessment was made by said assessors, as officers appointed by the board of commissioners of said county, and not as the agents or employees of said company, and that said company in no way connived at, consented to, or procured said assessors to list, view or assess any lands in said county, within one and one-half miles of said road, but that afterwards, on the — day of March, 1873, said board of commissioners, on the petition of said turnpike company, ordered the assessors of benefits to lands in said county, under the laws for the construction of plank, macadamized and gravel roads, to proceed, on April 3d, 1873, to list and view such omitted lands, and assess the benefits to such tracts of land, not included in said former assessment, that would result to each of said omitted tracts of land from the proper construction and maintenance of said road, and append such assessment, with their affidavit thereto attached that the same was just, fair and equitable, according to the best of their judgment and belief, to said

Webb v. The Brandywine Junction Turnpike Company *et al.*

former assessment, and report the same in writing to the auditor of said county as of the date of said former assessment mentioned in plaintiff's complaint; and that before reporting the same to said auditor, they correct all defects in said former report and return of said former assessment, in the form and manner in which the same was made out on the face of the paper, and report the same thus corrected; that the auditor make such changes and additions in the tax duplicate for said turnpike company, as such report might render necessary; that Ithamar Davidson, Robert Hughes and Richard H. Bentley, the assessors of benefits to lands for said county, did, on said — day of April, 1873, after receiving the notice to make said assessment from said auditor, and after making the affidavit before said auditor, hereafter referred to, proceed to view and list the omitted lands within the bounds specified, and assess the amount of benefits to each omitted tract, that would result thereto from the proper construction of said road, and did make the correction in said former report of said assessment on the face thereof, specified in their report, and afterwards, on the — day of —, 1873, reported the same, with their affidavit thereto attached, sworn to before said auditor, that said report and assessment thereto attached, together with the original assessment attached to said report, corrected as in said report specified, constitute a fair, just, correct and equitable assessment of the amount of benefits that would result to each tract of land within one and one-half miles on either side of said road, and within like distance of either end thereof, in said county; that said original assessment, as corrected in said attached report, together with said report of assessment of the omitted lands by them made and reported, embrace all the lands within one and one-half miles of said road, as located, on each side thereof, and within like distance from either end thereof; that said assessment, so made and reported, was correct, just, fair and equitable, according to the best of their

Webb v. The Brandywine Junction Turnpike Company et al.

judgment, as a *nunc pro tunc* assessment as of the date of said former assessment, and as a part thereof; and a copy of said petition, order of the board of commissioners, the affidavits of the assessors before and after their assessment and corrections, and of the report of their assessment and their corrections of the former assessment, duly certified by the auditor, was filed with and made part of said paragraph of answer. And the appellees averred, that after said report was filed by said assessors in the auditor's office, to wit, on the — day of —, 1873, said auditor gave notice by publication, in a weekly newspaper of general circulation in said county, that said assessors, on the — day of —, 1873, would meet at said auditor's office, and there act as a board of equalization on said supplemental assessment; that pursuant to such notice, said assessors did meet and sit as such board to equalize said assessment, and no complaint was made against, and no change was made in, said supplemental assessment; and a copy of all said supplemental proceedings was made part of said paragraph of answer. And it was then averred, that the assessors of benefits, in the original assessment, viewed all the lands within the limits prescribed by law, as returned in said original assessment; and that all the omitted tracts of land, mentioned in appellant's complaint, in said Shelby county, within the prescribed limits, are contained in said corrected and supplemental assessment; that said assessors have viewed and listed all said lands, and assessed the benefits to each tract benefited, as shown by their said report; that prior to the original assessment, the said company had located its road, where it was then, and was in process of completion on the route so located; and that said assessors, in making the said supplemental assessment, corrected each and every alleged error, as specified in appellant's complaint as a ground of objection against the original assessment, which constituted any ground or cause whatever for an injunction against said original assessment, as the same appeared fully corrected

Webb v The Brandywine Junction Turnpike Company *et al.*

in said supplemental assessment. This paragraph closed with a demand for judgment for all further costs, that the temporary restraining order be dissolved and the complaint dismissed, and that said assessment, as to appellant, be ratified and confirmed, and held valid, and other proper relief.

Appellant demurred to this second paragraph of appellees' answer, upon the ground that it did not state facts sufficient to constitute a defence to appellant's cause of action. This demurrer was overruled by the court below, and to this decision appellant excepted, and, refusing to plead further, judgment was rendered upon the demurrer, in favor of appellees and against appellant, for the costs of the action.

In this court appellant has assigned as error the overruling of his demurrer to the second paragraph of appellees' answer.

Since the decision of this cause, in the court below, and during its pendency in this court, appellant has obtained the relief sought for in this action in another mode, and by the action of another branch of our State government; that is, the appellees have been virtually enjoined, conclusively and perpetually, from collecting any part of the assessment on appellant's lands, mentioned in his complaint, by the action of the General Assembly of this State, in repealing the act of May 14th, 1869, under which said assessment was made, by a repealing act approved March 13th, 1875. Acts 1875, Reg. Sess., p. 80.

The effect of this repealing act upon uncollected assessments of lands for plank, macadamized and gravel roads, was fully considered and decided by this court in the case of *The Marion Township Gravel Road Co. v. Sleeth, Treasurer*, 53 Ind. 35. In that case, which was an application by the appellant, to the lower court, for a mandate to compel the appellee to collect certain assessments in favor of appellant, which had been duly placed upon the tax duplicate, an alternative writ of mandate had been

Webb v. The Brandywine Junction Turnpike Company et al.

issued, requiring the appellee to show cause why the mandate should not be made peremptory. To this alternative writ appellee made return, alleging and insisting that as the statute, authorizing the making and collection of such assessments, had been repealed, he was not authorized by law to collect said assessments. On demurrer thereto, this return was held good and sufficient, and judgment was rendered thereon for appellee, and, upon appeal to this court, the judgment of the lower court was affirmed. After citing a large number of authorities, *pro* and *con*, this court said: "Upon a careful examination of these authorities we are forced to the conclusion that by the repeal of the statute authorizing the making of the assessments and the collection thereof, not only the remedy for the collection of the assessments, but also the lien or right itself, is taken away. We think this was the result contemplated by the legislature, or they would have inserted in the act a clause saving the right to collect assessments in such cases." This case was approved and followed in the case of *Bradley v. The Brandywine, etc., Turnpike Co.*, 58 Ind. 70.

It follows, therefore, that the subject-matter of the controversy in this cause is effectually settled and disposed of; and the only question remaining in the case for our consideration and decision is, the sufficiency of the facts stated in the second paragraph of the answer to constitute a defence to the action. It is merely a question as to the sufficiency of the answer, as a matter of good pleading, without regard to the merits of the action.

As we understand the averments of the second paragraph of appellees' answer, it is thereby admitted that the objections stated in appellant's complaint to the original assessment, or at least some of them, were well taken, and that without some curative action being first had by the proper authorities, obviating those objections, the appellant would be entitled to the relief prayed for in his

Webb v. The Brandywine Junction Turnpike Company et al.

complaint. Therefore it was found necessary, not only that there should be a supplemental assessment of the lands omitted by mistake or oversight from the original assessment, but also that the latter, itself, should be corrected in some important particulars, before any successful defence could be made to appellant's action. With this view the proceedings were had by the board of commissioners and the assessors of benefits of Shelby county, which resulted in the *nunc pro tunc* or supplemental assessment, relied upon by appellees as a bar to the action, except as to costs then made. It may be remarked, parenthetically, that these supplemental proceedings were all had about twenty months after the commencement and during the pendency of this action.

The question now arises, and this is the only question left in the case, were the *nunc pro tunc* or supplemental proceedings, described in the second paragraph of appellees' answer, sufficient, under the law as it then stood, to defeat the cause of action, which appellant confessedly had at the commencement of his suit?

In the case of *The Sand Creek Turnpike Co. v. Robins*, 41 Ind. 79, it was held, by this court, that, upon the discovery of the fact, that any lands liable to be assessed for a turnpike road had been omitted from an assessment, the county commissioners might, of their own motion, or at the instance of any one interested, order the original assessors to proceed to view, list and assess all lands, if any, omitted in their former assessment report; and it was further held, that when such omissions were corrected, such completed assessment might be set up as a defence to the further prosecution of a pending suit to enjoin the collection of the assessment, because of such irregularity.

But the case cited is very different from the one now before this court. In that case, when it became manifest that the assessors of benefits, when they filed their assessment report, had not viewed, listed and assessed all the

Webb v. The Brandywine Junction Turnpike Company et al.

lands within the distance fixed by law of the road in question, the county commissioners simply ordered the same assessors to reassemble and to proceed to complete their assessment, as they ought to have done in the first instance; and when the assessment was thus completed and filed, there was but one assessment, made as the law contemplated it should be made, by three disinterested freeholders of the county, for that purpose lawfully appointed by the proper authority.

In the case at bar, however, if the two assessments, mentioned in appellees' second paragraph of answer as the original assessment and the *nunc pro tunc* or supplemental assessment, are to be considered as but one complete assessment, and they must be so considered to make them available to appellees for the purpose of their defence, we are then met with this difficulty,—we have one complete assessment, made, however, by disinterested freeholders of the county to the number of five, which was an unknown quantity under the law then in force authorizing the making of such assessments. If, on the other hand, the two assessments are to be regarded as separate and distinct assessments, then each of them was imperfect, and unauthorized by the law under which it was intended and attempted to be made.

We hold, therefore, that the facts stated in the second paragraph of appellees' answer were not sufficient to constitute a defence to appellant's action, and that the court below erred in overruling appellant's demurrer to said paragraph of answer.

Judgment reversed, at the costs of the appellees, and cause remanded, with instructions to the court below to sustain appellant's demurrer to the second paragraph of appellees' answer, and for further proceedings.

Webb v. The Brandywine Junction Turnpike Company *et al.*

ON PETITION FOR A REHEARING.

Howk, J.—The judgment of the court below, in this cause, was reversed by this court, on the 20th day of February, 1877. On the 19th day of the following April the appellees presented to this court a petition for a rehearing of the cause, in the conclusion of which petition was this request: .

“It is respectfully asked that a reasonable time may be allowed, before the court shall act upon this petition, within which the original counsel in this cause may file a brief more fully presenting their views on the questions made.”

In compliance with this request, we have now allowed two full months, which we regard as a reasonable time, for the filing of such a brief; but no brief has been filed, and we presume now that none will be filed. We will therefore briefly consider and decide the two points made in appellees' petition.

1st. In the original opinion, some complaint was indulged in, at the apparently useless labor which the decision of this cause imposed upon this court, when the Legislature had, as stated in the opinion, interposed a complete and, as it then seemed, a perpetual bar to the collection of the assessments of which the appellant complained. In what we thus and there said, it certainly was not intended to assign the legislative act as a reason for our decision of this cause. By no fair construction could any such inference be drawn from what we there said; but to remove even the shadow of a doubt as to the construction of the language used, we make this explanation.

2d. The second ground for a rehearing, assigned by the appellees, presents a very different question. In the original opinion, we held, that if the two assessments, mentioned in the record of this cause, constituted but one assessment, then it was an assessment made by five different assessors, being two more assessors than the law under

Webb v. The Brandywine Junction Turnpike Company *et al.*

which it was made contemplated or provided for, and that if, on the other hand, the two assessments were to be regarded as separate and distinct assessments, then each of them was imperfect and unauthorized by the law under which it was intended and attempted to be made. We find nothing in appellees' petition for a rehearing, which convinces us that we were in error as to either one of these propositions. It is suggested by appellees' counsel, that if this court should adhere to the first proposition, "Then, in many cases, no amendment can be made, for the reason that the persons who made the first assessment have gone out of office, removed, died or become disqualified." There would be more force, perhaps, in this argument, if it had been addressed to the law-making power, than addressed, as it is, to this court. It is not our province to make laws, but only to administer the law as made. Our proposition was, and we see no cause to change it, that the law, as it was written, made no provision whatever for an assessment by five, or any more than three, assessors.

Appellees' argument, in their petition for a rehearing, has suggested to us, however, another and perhaps stronger and more conclusive reason why the assessment or assessments in this case can not be upheld as legal and valid. The first assessment was made by three assessors, who were appointed as such by the board of commissioners of Shelby county, at its March term, 1869, under the gravel road law of March 11th, 1867. (Acts 1867, Reg. Sess., p. 167) This law was absolutely repealed by the gravel road law of May 14th, 1869. (3 Ind. Stat. 538) This latter law took effect on said last named day, and it contained no saving clause continuing in office the assessors appointed under the former law. Their functions as assessors, therefore, absolutely ceased on said 14th day of May, 1869. They assumed, however, to act as such assessors, and on the 10th day of June, 1869, without any reappointment as assessors, they reported said first assess-

 Johnson *et al.* v. Kohl.

ment to said board of commissioners. In our opinion, this first assessment, thus made, was wholly unauthorized by law, and was therefore null and void. The second assessment was solely made for the purpose of supplying omissions in the first assessment, and was therefore imperfect and of no validity. And for these reasons, the second paragraph of appellees' answer constituted no defence whatever to appellant's action.

The appellees' petition for a rehearing of this cause is therefore overruled.

The opinion on the petition for a rehearing was filed at the May term, 1877.

 JOHNSON ET AL. v. KOHL.

PRACTICE.—*Superior Court.—Appeal.—Assignment of Error.—Supreme Court.*
 —Where, on appeal from the special to the general term of the Superior Court, no error is assigned in the latter term, no question is presented to the Supreme Court, on appeal thereto.

From the Marion Superior Court.

L. Barbour, C. P. Jacobs and M. B. Williams, for appellants.

N. B. Taylor, F. Rand and E. Taylor, for appellee.

BIDDLE, J.—This case was tried at a special term of the superior court, and appealed to the general term. No errors were assigned in the general term; there is, therefore, no question presented to this court. This practice is well settled *Wesley v. Milford*, 41 Ind. 413; *Farman v. Ratcliff*, 42 Ind. 537; *Van Dusen v. Kindleburger*, 44 Ind. 282; *Wilson v. Harrison*, 44 Ind. 468; *Linsman v. Hugins*, 44 Ind. 474; *The Indianapolis, etc., Union v. The Cleveland, etc., R. W. Co.*, 45 Ind. 281; *Carpenter v. Sigler*, 47 Ind. 202; *Buser v. Blair*, 47 Ind. 519; *Bush v. The Grover and Baker, etc., Co.*, 48 Ind. 258; *Thurston v. Boardman*, 48

Nelson v. Vorce.

Ind. 426; *Russell v. Harrison*, 49 Ind. 97; *Huffman v. The Indiana National Bank of Indianapolis*, 51 Ind. 394; *Selking v. Jones*, 52 Ind. 409.

The judgment is affirmed, with costs.

Petition for a rehearing overruled at the May term, 1877.

NELSON v. VORCE.

WITNESS.—Credibility.—Jury.—Practice.—The weight to be given to the evidence of different witnesses testifying in a cause, is a question to be determined solely by the jury trying it.

SAME.—Whether or not interest in the result of the cause on trial, or relationship to a party to such cause, affects the credibility of a witness testifying therein is a question solely for the jury trying it.

SAME.—Party.—Relationship.—Instruction to Jury.—It is error for the court to charge the jury trying a cause, in relation to the credibility of witnesses, that "The evidence of parties to the action, and of those related to them, as their sons and daughters, is not entitled to as much weight as the evidence of disinterested witnesses."

From the Newton Circuit Court.

J. R. Troxell, P. H. Ward and W. H. Graham, for appellant.

R. S. Dwiggins and Z. Dwiggins, for appellee.

Howk, J.—The appellee, as plaintiff, sued the appellant, in the court below.

In his complaint, the appellee alleged, in substance, that on or about the — day of —, 1873, the appellee and appellant entered into a certain contract or agreement for the joint invention, perfecting, modelling and patenting of a certain wind-mill which the appellant had then and there in process of invention and construction; that, by the terms of said agreement, it was then and there contracted and agreed by and between the appellee and appellant, that if the appellee would assist the ap-

55	455
127	180
55	455
139	211
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140	365
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154	246

Nelson v. Vorce.

pellant in inventing and perfecting said wind-mill, and in modelling and securing letters-patent on the same, the appellant would, in consideration thereof, give and assign to the appellee a one-half interest in said wind-mill, as soon as the same should be perfected and letters-patent granted to the appellant thereon. And the appellee averred, that he had duly performed and complied with all the terms and conditions of said contract, on his part, in so far as was thereby required of him; that in compliance therewith, he aided and assisted the appellant in perfecting said invention, and constructed all necessary models of the same, and assisted the appellant in procuring letters-patent to be granted thereon, which said letters-patent were duly issued by the proper authority, to appellant, on the — day of —, 1873. And the appellee averred, that, after the issuing of said letters-patent, and until the filing of said complaint, the appellant had wholly failed and neglected to comply in any manner with the terms and conditions of his said contract, or any part thereof, and had failed and refused to give, convey or assign to appellee, in any manner, any interest whatever in said wind-mill; but, on the contrary, the appellant had been, since the date of said letters-patent, and then was, actively engaged in manufacturing and selling said wind-mills, and territory wherein the exclusive right to manufacture and sell said wind-mills was conveyed, and had converted the proceeds of said sales to the appellant's use and benefit, and appellant refused to pay or in any manner account to the appellee for any interest in the same. And the appellee averred, that said wind-mill was an invention of great value; that the appellant had realized from the sale of the same, and from the sale of territory wherein the exclusive right to manufacture and sell the same was granted, at least the sum of five thousand dollars, the one-half of which, as well as the one-half interest in said invention, the appellee was entitled to by the terms of said contract; and that the one-half

Nelson v. Vorce.

interest in said invention was of the value of ten thousand dollars.

There was a second paragraph to this complaint, but it did not differ materially from the first paragraph, except that it alleged a partnership between the appellee and appellant, in connection with the "wind-mill" mentioned in the first paragraph. As no questions are made in this court as to the sufficiency of the pleadings in this cause, we need not further notice the second paragraph of the complaint.

The appellant answered the appellee's complaint by a general denial, and also by a set-off. The appellee replied to the set-off, by a general denial, and by a special reply.

This action, being at issue, was tried by the court below, and a verdict was returned for the appellee, assessing his damages at three thousand eight hundred dollars. Upon written causes filed, the appellant moved the court below for a new trial, which motion was overruled by the court, and to this decision appellant excepted. And a judgment was then rendered by the court below, upon the verdict of the jury, from which this appeal is now here prosecuted.

In this court, the only alleged error assigned by the appellant is, the decision of the court below in overruling his motion for a new trial.

The appellant assigned several causes for a new trial, in his motion for that purpose addressed to the court below; but in this court he has only insisted on three of those causes. In the view which we have taken of this cause, we have found it necessary to notice only one of the several reasons assigned for a new trial. The evidence on the trial, and the instructions of the court below to the jury, are all properly in the record.

The sixth instruction given by the court below, to the jury trying the cause, was as follows:

"6th. You should reconcile the testimony of witnesses,

Nelson v. Vorce.

so as to believe them all, if you can do so ; but if you can not, then you must decide whose testimony should be received and whose should be rejected. In determining their credibility you are to look to their manner upon the witness stand, their interest, if any, in the action, their relationship to the parties, the consistency of their statements, and how far their testimony is corroborated or contradicted by the testimony of other witnesses. The evidence of parties to the action, and those related to them, as their sons and daughters, is not entitled to as much weight as the evidence of disinterested witnesses."

A very cursory glance at this instruction is sufficient to show that it was not a proper charge to the jury ; and when the fact is considered, which appears in the record, that the appellant was the only one of the parties whose son or daughter was a witness in the cause, it will readily be seen that this instruction was well calculated to work injustice to the appellant. The court below had no right to instruct the jury, as matter of law, that the evidence of appellant's son or daughter was not entitled to as much weight as the evidence of any other witness, or to imply, as the charge plainly did, that the evidence of such son or daughter needed some corroboration. The question of the weight of the evidence of the different witnesses was a question solely for the consideration of the jury, as the triers of the facts, and it was not the province of the court to intermeddle with this question, or to dictate to the jury what weight, much or little, should be given to the evidence of this or that witness, or to institute a comparison, for the instruction of the jury, between the weight of the evidence of the different witnesses.

But it is unnecessary to discuss this question. Under our law, as it now exists, the interest of a witness in the result of an action, whether as a party or as a kinsman of a party, does not disqualify him from testifying ; and such relationship, either to the action or to a party to the action, may or may not detract from the weight which his

Kern, Ex'r, *et al.* v. Maginniss *et al.*

evidence is entitled to; but whether it does or does not, in any case, is a question for the jury and not for the court.

It certainly is not the law, that because the witness is the son or daughter of a party to an action, such witness may not testify the truth, the whole truth, and nothing but the truth, touching the matter in controversy; and if such is the character of the testimony given, it can not be said, as matter of law, that such testimony is not entitled to as much weight as the testimony of any other witness.

In our opinion, the instruction given was erroneous, and for this cause the appellant's motion for a new trial should have been sustained by the court below.

The judgment is reversed, and the cause is remanded, with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings.

Petition for a rehearing overruled at the May term, 1877.

KERN, EX'R, ET AL. v. MAGINNISS ET AL.

PRACTICE.—*Partition.—Exceptions.—Supreme Court.*—To question the validity of a partition of lands, made and reported by the commissioners appointed therefor, exception must be taken, not merely to the decree for partition, but, to the report of such commissioners.

SAME.—*If, in an action for the partition of lands, where no motion for a new trial is made, a sale thereof is made and reported according to the decree therefor, no question is raised by a mere exception to the report of such sale.*

SAME.—*Verdict.—New Trial.*—Objections to the verdict rendered in such cause must be presented by a motion for a new trial.

From the Lawrence Circuit Court.

S. W. Short, for appellants.

F. Wilson and A. C. Voris, for appellees.

BIDDLE, J.—On the 10th day of May, 1870, the appel-

Kern, Ex'r, et al. v. Maginniss et al.

lees filed their complaint, praying the partition of certain lands, making the appellants defendants thereto. An answer and replies were filed, and issues joined, which were submitted for trial to a jury, who found certain facts, specially. No motion for a new trial was made, and no exceptions taken to the verdict; and, according to the verdict, the court decreed a partition of the lands, in specific shares, to each claimant, and appointed commissioners to make division of the lands accordingly. To this interlocutory decree the appellants made objections, which were overruled, whereupon they reserved exceptions to the opinion of the court.

At the next term of the court the commissioners made their report, partitioning certain of the lands to the parties, and reporting that certain other of the lands were indivisible. To this report no objections were made, no exceptions filed, and none reserved in any manner. The court approved and confirmed the report, and appointed a commissioner to make sale of the lands which could not be divided, according to the terms of the report. At this stage of the proceedings, the appellants appealed from the interlocutory order of the court, decreeing partition of the lands, to this court, wherein the appeal was dismissed, on the ground that the decree of partition was not a final judgment, and not an interlocutory order, from which an appeal would lie. *Kern v. Maginniss*, 41 Ind. 398. The case, after the appeal, was continued in the lower court for several consecutive terms, and until the opinion of this court was spread upon the records in the court below. The court then ordered the commissioner, before appointed, to proceed and make sale of the property, pursuant to the former order of the court. At a subsequent term of the court, the commissioner made his report of the sale of the lands, to which the appellants filed exceptions, which were overruled by the court, and the report confirmed. To this ruling the appellants excepted, and appealed to this court.

Graeter v. Williams.

If the appellants had any objections to the verdict of the jury, they should have moved for a new trial, and properly reserved their exceptions. If they had any objections to the report of the commissioners partitioning the land, they should have shown good cause against it, and properly reserved their exceptions. 2 R. S. 1876, p. 348, sec. 17. Such a report stands as a verdict until it is set aside for good cause shown. *Lucas v. Peters*, 45 Ind. 313.

The appellants—not having moved for a new trial upon the rendition of the verdict, and not having shown any cause against the report of the commissioners partitioning the land,—have not reserved any exceptions in the record, except their exceptions to the report of the commissioner, in making sale of the lands in pursuance of the order of sale; and, as to this, it is not claimed that the sale was not in accordance with the order; nor as to this, have they made any assignment of error on the record. There is, therefore, no question presented to decide. The exceptions taken to the interlocutory order of partition will not excuse the appellants from excepting to the report of the commissioners made in pursuance of it, if they desired to question its validity.

The judgment is affirmed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

GRAETER v. WILLIAMS.

MALICIOUS PROSECUTION.—*Defence.*—*Suspicion.*—*Belief.*—In an action to recover damages for malicious prosecution, the mere fact that the defendant had honestly suspected or believed the plaintiff to be guilty of the crime for which he had caused the latter to be prosecuted is no defence.

SUPREME COURT.—*Practice.*—*Assignment of Error.*—To present, for the con-

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138	160
138	582
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Graeter v. Williams.

sideration of the Supreme Court, on appeal, the action of the court below upon a demurrer to an answer, it must be assigned as error.

SAME.—Argument.—Waiver.—The failure of a party, in his argument on appeal to the Supreme Court, to notice a question presented by his assignment of errors, is deemed a waiver thereof.

SAME.—Instructions to Jury.—Objections to.—How Shown.—Where alleged error, in instructions given to the jury, is relied upon as ground for obtaining a reversal of a cause in the Supreme Court, a mere reference in the argument to the fact that such instructions were given, excepted to and embodied in a motion for a new trial, is insufficient, as the grounds of objection to each of them must be clearly pointed out.

SAME.—Petition for Rehearing.—It is too late, upon petition for a rehearing of a cause, then to present, for the first time, a question for the consideration of the Supreme Court.

SAME.—Bill of Exceptions.—A statement of fact, alleged as cause in a motion for a new trial, must be shown by a bill of exceptions to be true, or alleged error, based thereon, will not be considered by the Supreme Court.

NEW TRIAL.—Practice.—Evidence Excluded.—The evidence intended to be elicited by a question put to a witness but excluded by the court must be plainly stated to the court at the time such question is asked, to make such exclusion available as cause for a new trial.

From the Knox Circuit Court.

W. H. De Wolf, S. N. Chambers, G. G. Reily and W. C. Johnson, for appellant.

H. S. Cauthorn, J. M. Boyle and S. W. Williams, for appellee.

Howk, J.—This was an action by appellee, as plaintiff, against the appellant, as defendant, in the court below, to recover damages for an alleged malicious prosecution of the appellee by the appellant.

The appellee alleged, in substance, in his complaint, that he had always been of good repute, and, by his conduct, had deservedly acquired and possessed the good opinion and credit of his friends and neighbors, and, until the commission by the appellant of the grievances mentioned in said complaint, had never been suspected or charged with having committed the crime of forgery or any other felony whatever; but that the appellant, well knowing the premises, heretofore, to wit, on February

Graeter v. Williams.

7th, 1874, at the February term of the court below, falsely, maliciously and without any reasonable or probable cause whatever, indicted, and caused and procured to be indicted, by the grand jurors of said Knox county, and State of Indiana, the appellee in this action, for the crime of forgery, by causing and procuring to be returned into said court, by said jurors, an indictment against the appellee, for said crime, in this, to wit, charging the appellee with having, *first*, unlawfully, feloniously and falsely forged and counterfeited an endorsement of an order, with intent to defraud one Charles Graeter, and, *second*, unlawfully, feloniously and falsely forged and counterfeited an endorsement of said order, for the purpose and with the intent to defraud one, "The First National Bank,"—said charges being in manner and form as shown by said indictment, a copy of which was filed with and made a part of said complaint; that the appellant, afterward, falsely and maliciously, and without any reasonable or probable cause, prosecuted and caused to be prosecuted, the said indictment against the appellee, until the appellee was, afterwards, at the February term, 1874, of the court below, on the — day of February, 1874, tried, in due manner and due course of law, upon said indictment, by a jury of his country, and was by said jury acquitted of the said premises in said indictment charged, and therefore, by the judgment of the court below, the appellee in this cause was acquitted thereof, and permitted to go thence without day; and that by means thereof, the appellee had been damaged and injured in his reputation, good name and fame, by the said false and malicious acts of the appellant, in the sum of ten thousand dollars; for which sum, and for all other proper relief, the appellee demanded judgment against the appellant.

The appellant demurred to appellee's complaint, for the want of sufficient facts therein to constitute a cause of action, which demurrer was overruled by the court below, and to this decision the appellant excepted.

Graeter v. Williams.

Appellant then answered appellee's complaint, in two paragraphs, to wit:

- 1st. A general denial; and,
- 2d. A special defence.

Appellee demurred to the second paragraph of appellant's answer, for the want of sufficient facts therein to constitute a defence to this action. This demurrer was sustained by the court below, and appellant excepted; but as appellant has not, in this court, assigned this decision of the court below as error, we need not notice further the second paragraph of the answer.

The action being at issue was tried by a jury, in the court below, and a verdict was returned for the appellee, assessing his damages at four hundred dollars. Upon written causes filed, the appellant moved the court below for a new trial, which motion was overruled, and to this decision appellant excepted, and a judgment was rendered upon the verdict, in favor of the appellee and against the appellant.

In this court, the appellant has assigned the following alleged errors:

- 1st. The overruling by the court below of appellant's demurrer to appellee's complaint; and,
- 2d. The overruling by the court below of appellant's motion for a new trial.

First. In his argument of this cause, in this court, the appellant has wholly failed to allude, even, to the first alleged error. In accordance with the well established practice of this court, in such cases, we consider this course, on the part of the appellant, as tantamount to an express waiver by him of the alleged error, even if such error really existed.

Second. Several causes were assigned by appellant for a new trial, in his motion for that purpose. In considering the questions presented by the second alleged error, however, we will pass upon and decide only such of those questions as appellant's counsel have directed our atten-

Graeter v. Williams.

tion to, in their well considered brief of this cause. In so doing, we shall consider those questions in what we regard as their natural order, and not in the order adopted by appellant's counsel.

Among the causes for a new trial, assigned by appellant, were errors of law, occurring at the trial, and excepted to at the time by the appellant. One of these alleged errors of law was thus stated in appellant's motion for a new trial, to wit:

"In refusing to permit the defendant to ask O. H. Cobb, a witness for defendant, whether or not the check drawn by William Baker, in favor of Charles Graeter, for two hundred and fifty-six and $\frac{1}{10}$ dollars, said check and endorsement having been read in evidence, was read in evidence on the trial of the indictment against said Williams, the plaintiff?"

When we look at the bill of exceptions, which is properly in the record, and which we are bound to receive as "absolute verity", on every matter correctly embraced therein, we find that the question which the appellant actually propounded to the witness, O. H. Cobb, and to which the appellee objected and the court below sustained the objection, was in these words:

"Was the check, and the endorsement thereon, 'Charles Graeter, S. W. W.', read in evidence, and, if not, why not?"

This was the only question propounded by appellant to the witness, Cobb, and objected to by appellee, and the objection sustained, as shown by the bill of exceptions. It will readily be seen, that there is a wide difference between the latter question and the question set out in appellant's motion for a new trial. And the court below, which sustained appellee's objection to this latter question, might well have said, when appellant's motion for a new trial was presented, that it had never sustained any objection to any such question as the one recited in said motion. It will be seen, that if it were conceded that the decision

Graeter v. Williams.

of the court below, in merely sustaining an objection to a question to a witness, without any thing else being shown in connection therewith, presented any inquiry for our consideration, we would be bound to hold that the bill of exceptions did not show that the court below had made any such decision as the one set out and complained of in appellant's motion for a new trial, as alleged error of law, in sustaining appellee's objection to the particular question set out in said motion.

But where a party, on the trial of a cause, has propounded a question to a witness, with the view of eliciting evidence, to which question an objection has been sustained by the court, such party can not, by simply saving an exception to the decision of the court, in sustaining such objection, get error into the record, which will be available to him in this court. In such a case, the party must go farther, and state to the court in which his cause is being tried, clearly and explicitly, what the evidence is, which he offers to adduce, and which he expects to elicit from certain competent witnesses. Then, if the court decides that such offered evidence is inadmissible, and excludes it, and the party, at the time, excepts to such decision, and if the party assigns such decision as alleged error of law, occurring at the trial and excepted to at the time, as a cause for a new trial, in his motion for that purpose, clearly specifying and pointing out in such motion the excluded evidence, and if the party will then, by proper bill of exceptions, get the offered evidence, the decision of the court thereon, and his exceptions to such decision, into the record,—then the party will have his record so constructed, that this court can take cognizance of, and decide upon, the alleged erroneous ruling of the court below, in excluding his offered evidence. But where, as in the case at bar, the question presented is, whether or not the court erred in sustaining an objection to a particular question, and we have not been informed, but are left to conjecture, what would have been the an-

Graeter v. Williams.

swer,—we can not say whether or not the court below erred in its ruling; but we can say, with positive certainty, that the appellant, by his exception saved, has presented no available error of the court below, if any such existed, for our determination. *Mitchell v. Chambers, ante*, p. 289.

Among the errors of law occurring at the trial, and excepted to at the time by the appellant, and complained of in his motion for a new trial, were certain instructions, given by the court below, of its own motion, to the jury trying the cause. In his brief of this cause, in this court, every word said by the appellant, of and concerning the instructions of the court below to the jury, is contained in the following sentence:

“There were several exceptions to the instructions given by the court, many of which, it is submitted, were well taken.”

That sentence contains appellant's entire argument in contravention of the law applicable to this case, as stated and given to the jury in the instructions of the court below. The fact that “There were several exceptions to the instructions given by the court” is apparent on the face of the record. But that many, or even any, of these exceptions “were well taken,” does not appear on the face of the record or elsewhere; and if appellant's counsel believed that any of these exceptions were well taken, it would have been better, perhaps, for their client, and might have aided us in the discharge of our duty, if they had indicated to us, in some manner, in what particulars, if any, they thought that the instructions of the court below, to the jury trying the cause, were erroneous. We have carefully read the instructions given to the jury, and we have no hesitation in saying, that, in our opinion, these instructions of the court below contained a full and fair statement of the law applicable to the facts of this case, as the same were developed by the evidence adduced on the trial.

Appellant also insists that the court below erred on the

Graeter v. Williams.

trial of this cause, in this, that the court refused to give an instruction to the jury, asked for by the appellant. This instruction was in these words:

“If the jury believe that the acts of the plaintiff, which had come to the knowledge of the defendant, pertaining to the check and its endorsement, were such as would lead a man in the defendant’s position, of ordinary caution and prudence, to believe or entertain an honest suspicion that the plaintiff was guilty of forgery, they should find for the defendant.”

The court below committed no error in refusing to give this instruction to the jury. It did not and does not state the law of this State, applicable to this case. In the case of *Lawrence v. Lanning*, 4 Ind. 194, it was held by this court, that the mere belief that a person had been guilty of a crime was not sufficient to authorize a criminal prosecution against him. “There must have been reasonable and probable cause for instituting the criminal proceeding.”

The doctrine of the case cited has been since approved and followed by this court, in *Lacy v. Mitchell*, 23 Ind. 67, and in *Hayes v. Blizzard*, 30 Ind. 457. It is hardly necessary for us to add that mere suspicion, honest or otherwise, will not authorize the institution of a criminal prosecution.

The only other matters, urged upon our consideration by the appellant’s counsel, are, that the verdict of the jury trying the cause was not sustained by sufficient evidence, and was contrary to law. These matters have been ably and elaborately discussed by the attorneys of both appellee and appellant. It is unnecessary for us, however, to follow counsel in this discussion. It is clear to our minds that this action was fairly tried in the court below, and that competent evidence, tending to sustain each material averment of appellee’s complaint, was adduced before the court and jury trying the cause. Where this is the case, this court will not disturb the verdict on the mere weight of the evidence. So this court has uniformly

Graeter v. Williams.

decided, since its earliest organization, and so we now decide.

In conclusion, we hold that the court below did not err, in overruling appellant's motion for a new trial.

The judgment of the court below is affirmed, at the appellant's costs.

ON PETITION FOR A REHEARING.

Howk, J.—In the appellant's motion for a new trial of this cause, in the court below, one of the causes assigned for such new trial was alleged error of law, occurring at the trial and excepted to, in certain instructions given by the court, of its own motion, to the jury trying the cause. In his argument of this cause, in this court, the appellant failed to discuss these alleged erroneous instructions, or to indicate to us, in any manner, wherein the instructions or any of them were erroneous. In the original opinion in this case, we passed over these instructions, thirteen in number, without any special consideration. This was done in strict conformity with the well established practice of this court, to consider any alleged error, which is not discussed in this court by the party complaining thereof, as thereby waived. *Breckenridge v. McAfee*, 54 Ind. 141.

The appellant has now filed a petition for a rehearing of this cause, upon the express and only alleged ground that one of the said instructions of the court below to the jury trying the cause was erroneous, and in his petition he has discussed for the first time, in this court, this alleged error of the court below. The petition for a rehearing is therefore based upon a ground which was neither presented by appellant nor specially considered by this court, on the first hearing of this cause. In the case of *Yater v. Mullen*, 24 Ind. 277, FRAZER, J., said: "It is, by the well settled practice of this court, too late to present a question for the first time on a petition for

Ricketts v. Dorrel.

rehearing." The rule of practice referred to was approved by this court, in the cases of *Heavenridge v. Mondy*, 34 Ind. 28, and *Brooks v. Harris*, 42 Ind. 177.

In our opinion, this rule of practice is a wise one, and ought to be applied in this case.

Appellant's petition is therefore overruled.

Opinion on petition for rehearing filed at the May term, 1877.

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145	571

RICKETTS v. DORREL.

REPLEVIN.—Fence.—Fixture.—Fence rails and stakes, though unlawfully taken and detained by a wrong-doer, when used by him in the construction of a fence upon his real estate, thereby become part of such realty, and can not be replevied by the owner as personal property.

SAME.—When an article is made personal property, by being severed, by a wrong-doer, from the realty to which it first belonged, it may be replevied, by the owner, as long as its separate identity can be ascertained; but not after it has been united to and forms part of any realty.

SAME.—Statute Construed.—Action. — Real. — Personal. — The legislature of this State did not, by the enactment of the code abolishing the distinctions between actions at law and suits in equity, and between the forms of such actions and suits, thereby abolish the distinction existing between real and personal actions, so as to allow rights in, or injuries to, real property to be determined in an action for replevin.

NEW TRIAL.—When to be Asked.—A motion for a new trial of a cause must be made at the term at which the finding or verdict therein is rendered.

From the Ohio Circuit Court.

H. W. Harrington, for appellant.

D. T. Downey and *A. C. Downey*, for appellee.

BIDDLE, J.—Replevin, commenced before a justice of the peace. The cause of action is stated as follows:

"William Dorrel, being duly sworn, says that his personal property, consisting of seven hundred and thirty-eight rails of walnut and oak wood, of the value of fifteen dollars, and one hundred and sixty-four stakes of oak and

Ricketts v. Dorrel.

walnut wood, of the value of five dollars, have been wrongfully taken and are unlawfully detained by James C. Ricketts; that said personal property has not been taken by virtue of any execution or other writ against him, and that he has sustained damages, by said wrongful taking and unlawful detention, in the sum of twenty-five dollars," etc.

Before the justice of the peace, the appellant moved the court to dismiss the action and quash the writ of replevin. His motion was overruled. Answer, general denial and two special paragraphs. During the trial before the justice, "It appeared to the court that the title to land was under dispute," and he thereupon certified the case to the Ohio circuit court. The parties in the circuit court appeared to the action, and the appellant, without taking any exceptions to the mode in which the case had been certified up, moved to dismiss the action. His motion was overruled, and exceptions reserved. Trial by jury, general verdict for appellee, and for five dollars damages, with answers to special interrogatories as follows:

"1. Is William Dorrel the owner and entitled to the possession of the rails and stakes described in the complaint?

"Answer. Yes.

"2. Was Dorrel the owner of the east half of the line fence between him and Ricketts, before the same was removed by Ricketts?

"Answer. Yes.

"3. Did the rails and the stakes in the complaint named, at the time when this suit was brought, and when seized by virtue of the writ of replevin herein, form a part of a partition fence, dividing the lands of Dorrel and Ricketts?

"Answer. Yes.

"4. At the time this suit was brought, and when they were seized by virtue of the writ of replevin herein,

Ricketts v. Dorrel.

did they form a part of, and were they connected with, a standing fence?

“Answer. Yes.”

The appellant moves “the court, upon his written motion, now filed, for a judgment on the special findings of the jury herein.”

These proceedings were had at the January term of the court, 1875. At the March term of the court, 1875, the motion for judgment on the special findings was overruled, and exceptions reserved. No application or motion for a new trial, upon written causes filed, was made at the term the verdict was rendered. No question, therefore, which arises under a motion for a new trial, is presented in the record. *Krutz v. Craig*, 58 Ind. 561; *Griesel v. Schmal*, post, p. 475; *Sherlock v. The First National Bank, etc.*, 58 Ind. 73; *Marshall v. Beeber*, 58 Ind. 83.

In support of the motion for a judgment on the special findings, it is insisted that they show the rails and stakes replevied to have been, at the time, erected into a fence, and remaining a part thereof; and that the fence, being a part of the realty, and owned by the parties as tenants in common, can not be replevied as personal goods.

The special findings in this case plainly show that the rails and stakes replevied, at the time the suit was commenced, and when they were taken by virtue of the writ, constituted a part of a standing fence, and were, therefore, a part of the realty. We are of the opinion that they were not “personal goods,” in the true meaning of the statute authorizing replevin, (2 R. S. 1876, p. 628, sec. 71) and, therefore, not subject to be replevied, even admitting that they were wrongfully taken and wrongfully detained, and wrongfully put in the fence, by the appellant. If a person wrongfully took and detained shingles, and nailed them upon his roof, or wrongfully took and detained brick, and laid them in a wall, it would be a mischievous and unsafe rule to allow the owner to replevy them, even though his rights were greatly out-

Ricketts v. Dorrel.

raged. There are other remedies to redress a wrong of this kind; and in laying down the present rule as law, we deny the party no right, but simply refuse him a remedy by replevin. In the present case, if the appellee has suffered a wrong, we think he has mistaken his remedy to redress it.

The judgment is reversed, with costs. Cause remanded for further proceedings.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The earnestness of the petition for a rehearing in this case convinces us of the sincerity of the petitioner, but it seems to us that he has misconceived the scope of the opinion pronounced. He labors to convince us that when a tree is wrongfully converted into rails, they may be replevied; and when timber is wrongfully cut and converted into coal, the coal may be replevied; and cites other similar cases. The opinion nowhere controverts these propositions. When an article is made personal property by being severed from the realty to which it first belonged, it may be replevied as long as its separate identity can be ascertained, whatever shape it may take; but when an article of personal property, though wrongfully taken, has become real estate by being attached to the realty, it can not be replevied, because it has lost its separate identity, and its character as personal property. To apply these principles to the present case:—If rails are wrongfully taken from a fence, they become personal property and may be replevied by the owner; but if rails are wrongfully taken and put into a fence, and thus made a part of the realty, they can not be replevied, because they have lost their separate identity, and can not be delivered without detaching them from the realty, of which they have become a part. And this is precisely the case we are considering. We have examined the authorities cited by the petitioner, and, as we read them,

Ricketts v. Dorrel.

all the cases in replevin are against the petitioner. In *Davis v. Easley*, 13 Ill. 192, it is held, that a party may maintain replevin for boards made from trees wrongfully cut on his land; and also held that the owner of personal property, wrongfully taken, may replevy it so long as it can be identified, unless it is annexed to or made a part of some other thing which is the principal, as timber converted into a house, grain converted into malt, or coin converted into a cup.

The appellee also labors hard, and cites many authorities, to show us that a wrong-doer can not obtain any title in the property he wrongfully takes, as against the owner—a proposition nowhere disputed; but it does not follow that the action of replevin will lie in all cases, merely because the owner has not lost the title to his property. Nor will our statute abolishing the distinction between the forms of actions aid the appellee. The legislature can not abolish the distinction between personal and real actions, nor between actions to enforce a specific performance of a contract or recover a specific article, and those which seek merely a money judgment; nor between actions arising out of tort, and those founded upon contract; because the distinction exists in fact, and not in mere form. The distinction between the actions of debt, covenant, assumpsit, trover, trespass, trespass on the case, and suits in equity to recover money directly, may be and is abolished by the code, because the remedy sought in all these cases is the same, namely a money judgment. The appellee, therefore, can not bring his action in replevin to recover his specific rails, and, failing in that, maintain his case to recover a money judgment for their value, merely because he has not lost his property in the rails. The law affords him ample remedy if he rightly chooses it; but it is no part of the duty of this court to instruct him as to what that remedy is.

The petition is overruled.

Opinion on petition for rehearing filed at the May term, 1877.

Griesel v. Schmal, Receiver.

GRIESEL v. SCHMAL, RECEIVER.

PLEADING.—Complaint.—Motion in Arrest.—Action by a Receiver.—In an action by an alleged receiver, the complaint averred an indebtedness by the defendant to the plaintiff, and that the plaintiff was the duly appointed receiver of a certain person, named, and authorized to sue for and collect the debts of the latter; but there was no averment as to when, or by what, if any, court such receivership had been decreed.

Held, on motion in arrest, no demurrer having been filed thereto, that the complaint is sufficient.

QUERY.—Whether proof of indebtedness to plaintiff's alleged insolvent could be admitted under such complaint.

BILL OF EXCEPTIONS.—New Trial.—Supreme Court.—Practice.—Questions arising upon the motion for a new trial of a cause can not be presented to the supreme court, by a bill of exceptions filed, without leave of court, beyond the term at which such motion was acted upon.

From the Lake Circuit Court.

M. Wood and T. J. Wood, for appellant.

E. C. Field, T. J. Merrifield and S. E. Perkins, Jr., for appellee.

BIDDLE, J.—Complaint by appellee, against appellant, as follows:

"The plaintiff complains of the defendant and says, that he is the duly appointed receiver of the late firm of Krost & Horst, brewers, in Crown Point, Indiana, consisting of John Krost and Joseph Horst; that he was authorized and directed to sue and collect the debts due the said firm. That the defendant herein is indebted to said plaintiff," etc. The remaining part of the complaint is in the usual form of a common count for money had and received.

Answer and reply. No question below was made on the pleadings. Trial by jury; verdict for appellee; motion for a new trial; overruled; exceptions; motion in arrest of judgment; overruled; exceptions; judgment on the verdict; appeal.

Six assignments of error are alleged in this court, but only three of them are properly based upon questions

Griesel v. Schmal, Receiver.

raised in the record; 3, overruling the motion for a new trial; 4, overruling motion in arrest of judgment; and 6, "that the complaint does not state facts sufficient to constitute a cause of action."

The sufficiency of the complaint is the main question discussed by the parties. It is alleged against it that it "does not show how, when, where, or by what court he," the appellee, "was appointed receiver; whether by a court in Indiana, Illinois, or any other State;" and "fails to show any facts giving Adam Schmal a right to sue the appellant, as receiver." Whether the complaint could have withstood a demurrer, if it had been attacked by that method, is not a question before us; but many inaccuracies and omissions which would be fatal to a complaint, if advantage had been taken of them in an early stage of the proceedings, are cured by a verdict; *Gander v. The State ex rel.*, 50 Ind. 539; and a motion in arrest of judgment does not reach all the defects in a complaint which might be reached by a demurrer; *Spahr v. Nicklaus*, 51 Ind. 221; *The Toledo, etc., R. W. Co. v. Milligan*, 52 Ind. 505; *Harris v. Rivers*, 53 Ind. 216.

It is also objected to the complaint that it shows no indebtedness to Krost & Horst, but shows an indebtedness to the plaintiff. It surely can be no objection to a complaint, which can be reached by a demurrer, that it shows an indebtedness to the plaintiff. Whether proof of an indebtedness to Krost & Horst would sustain the complaint, is a question not presented.

We are of the opinion that the complaint is sufficient, at least where no objection is made to it until after verdict.

The appellant in his brief discusses, at great length, the insufficiency of the evidence to sustain the verdict. There is no such question before us. There is no such cause assigned in the motion for a new trial. The only causes assigned for a new trial are, "first, the verdict and finding of the jury" [are] "contrary to law; second, that there was misconduct of the jury as shown by affidavit."

The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

This affidavit is nowhere and in no manner made a part of the record. The cause was tried at the November term, 1873; no time was given beyond the term to file a bill of exceptions; and none was filed, as far as the record shows, until the 4th day of February, 1875. Under the motion for a new trial there is no question whatever before us. *Krutz v. Craig*, 53 Ind. 561.

The judgment is affirmed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS R. R. Co.
v. LYON.

RAILROAD.—Killing Stock.—Action at Common Law.—Negligence.—Pleading.

—To be sufficient as an action at common law, the complaint against a railroad company, to recover damages for negligently killing stock, must allege that such injury did not result from negligence of the plaintiff.

SAME.—Misjoinder of Actions.—Surplusage.—Statutory Action.—Where, in such action, the complaint does not show the plaintiff to have been guilty of no contributory negligence, but is sufficient as a complaint under the statute of this State,

Held, on demurrer for misjoinder of causes of action, that allegations of negligence on the part of the defendant should be treated as surplusage, and the action regarded as statutory.

SAME.—Action Under the Statute.—A complaint is sufficient against such company, to recover damages for killing stock, alleging that such stock, being the property of the plaintiff, had entered upon the defendant's right of way and track, at a point where the same had been carelessly and negligently left unfenced, and, whilst there, was, by the defendant's train of cars, driven into a cut through which such track ran, and there killed.

SAME.—Defence.—Evidence.—Fencing Road.—In such statutory action, the defendant need not allege, but under the general denial, simply, may prove, that the point where such stock entered upon its track was one which could not properly be fenced.

SAME.—Instructions to Jury.—On the trial of such statutory action for killing stock, instructions to the jury, applicable only to an action therefor at common law, are erroneous.

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The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

track, and into an inclosure, made, along said railroad track by a high fence erected on each side of said track, and near to the same, and by two cattle-guards, one at each end of said fences, one of which cattle-guards said mules and horse were forced to jump, as above stated; that said mules and horse, so being confined in said enclosure, as above stated, were thereby greatly exposed to and in danger of being run over and destroyed by the locomotives and cars running on and over said railroad track; that said persons, agents and servants, when so running and managing said locomotive and cars, well knew that said mules and horse, by said careless and negligent running and management of said locomotives and cars, were thereby, then and there, driven and forced to jump across said cattle-guard and into said enclosure, as aforesaid, and then and there well knew that the said mules and horse, so in said enclosure as aforesaid, were thereby greatly in danger of being run over and destroyed by the locomotives and cars running on and over said railroad track.

“That said persons, agents and servants, not regarding their duty in that respect, carelessly and negligently failed to drive said mules and horse out of said enclosure, and carelessly and negligently suffered and permitted said mules and horse to remain in said enclosure.

“That while said mules and horse were so confined in said enclosure, on the same day, and soon after said mules and horse had been so driven across said cattle-guard and left confined in said enclosure as aforesaid, the locomotive running on and over said railroad track, in the direction from said city of Columbus to said city of Shelbyville, was so carelessly and negligently run and managed by the agents, persons and servants running and managing the same, that said last named locomotive and cars ran against and over said two mules and horse, in said county, and killed and destroyed said two mules, and then and there and thereby so injured the said horse that he was and is

The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

thereby rendered of no value, to the damage of the plaintiff five hundred and eighty dollars. Wherefore," etc.

To this complaint, the appellant answered by a general denial of the allegations of the complaint.

The action was tried by a jury, in the court below, and a verdict was returned for the appellee, assessing his damages at four hundred dollars. On written causes filed, the appellant moved the court below for a new trial, which motion was overruled by the court, and to this decision the appellant excepted. And the appellant then moved the court below, in writing, in arrest of judgment, for two alleged causes, to wit:

1st. Because the appellee's complaint did not state facts sufficient to constitute a cause of action; and,

2d. Because the appellee had improperly united two causes of action in the same complaint, to wit: the cause of action given by statute against railroad companies, whose roads are not securely fenced, etc., for the killing of stock, etc.; and the cause of action which existed independently of the statute, for the negligent killing of stock, without the fault of the owner thereof.

This motion was also overruled, and appellant excepted, and a judgment was rendered upon the verdict.

In this court, the appellant has assigned the following alleged errors:

1st. The overruling of appellant's motion for a new trial; and,

2d. The overruling of appellant's motion in arrest of judgment.

We will consider these alleged errors, and decide the questions thereby presented in their inverse order. The second alleged error presents, for our consideration and decision, to a somewhat limited extent, the question of the sufficiency or insufficiency of the facts stated in appellee's complaint, to constitute a cause of action. We say, to a limited extent, for the reason that there may be cases, in which a complaint would be held insufficient on

The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

demurrer for the want of facts therein, sufficient to constitute a cause of action, where the same complaint would be held sufficient, on a motion in arrest of judgment, upon the ground that the defects in the complaint had been cured by the verdict.

The complaint in this action has been artfully prepared; so much so, as to render it difficult to determine whether the appellee intended to rely, for a recovery in this cause, upon the alleged fact that appellant's railroad was not securely fenced in, as required by the statute, or upon the alleged fact that appellee's mules were killed, and his horse injured, by and through the negligence and carelessness of the appellant's servants and employees. The learning, skill and experience of appellee's attorney forbid us from presuming that he intended to violate the rules of good pleading by stating two causes of action, in a single paragraph of complaint. We have concluded, that appellee's complaint was intended to and did state a single cause of action only, namely, that appellee's mules were killed, and his horse was injured, by reason of the fact that appellant's railroad was not securely fenced in, and that appellant was liable to the appellee for the damages sustained by him in the premises, under and by virtue of the statute. It is very clear, that the averments of the complaint, in relation to the carelessness and negligence of the appellant's servants and employees, in connection with the killing of appellee's mules and the injury of his horse, and the other facts alleged, were not sufficient to constitute a cause of action, at common law, and independently of the statute requiring the fencing in of railroads, against the appellant. This was so, for the reason that the complaint did not contain the necessary averment, that appellee's mules were killed and his horse was injured, without fault or negligence on his part. In the case of *The Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380, it was held by this court, upon the authority

The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

of a number of prior cases, there cited, that a complaint against a railroad company, for negligently killing stock, to be good at common law, must allege that the injury did not result from the negligence of the plaintiff. And the case cited was approved and followed by this court, in the case of *The Jeffersonville, etc., R. R. Co. v. Underhill*, 40 Ind. 229, and in the case of *The Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind. 402.

It seems to us, therefore, that all the averments of the appellee's complaint, in the case now before us, of and concerning the carelessness and negligence of appellant's servants and employees, ought to have been, and must be, regarded as mere surplusage. But, in our opinion, the other averments of appellee's complaint stated a good cause of action against the appellant, under the statute, for the killing of appellee's mules, and the injury of his horse. And, therefore, we think that the court below committed no error in overruling the appellant's motion in arrest of judgment.

We will now consider the questions presented by the alleged error of the court below, in overruling appellant's motion for a new trial. There were several alleged causes for a new trial, assigned by appellant in his motion for that purpose. Among these causes was alleged error of the court below, in giving, of its own motion, instructions to the jury trying the cause, numbered respectively 3, 6, 7, 8, 9 and 10, to the giving of which instructions the appellant at the time excepted. Under our view of the appellee's complaint in this case, that it states a cause of action against the appellant, under the statute, and not at common law, the 3d instruction of the court to the jury,—to the effect that if the railroad, where the animals went upon it, was not fenced when it might have been, the appellant was liable for their death or injury, without regard to negligence,—was not objectionable.

The 6th instruction of the court to the jury was in these words:

The Jeffersonville, Madison and Indianapolis R. R. Co. v. Lyon.

“6th. If the place when and where the stock went upon the track was not a proper place to be fenced, it was for the company to *aver* and prove it. In the absence of any such *averment* and proof, you must find that the place was a proper place for maintaining a fence. But the question for you to settle on this branch of the case is, was that part of the track, where the stock was killed, securely fenced?”

This instruction of the court to the jury did not state correctly the law of this State, on the subject of the instruction. No affirmative pleading or averment, that the place was one not proper to be fenced, is necessary, nor has such pleading or averment ever been required. In the case of *The Toledo, etc., R. W. Co. v. Owen*, 43 Ind. 405, an action by appellee, against appellant, to recover the value of a cow injured, etc., on appellant's road, an answer,—in which the appellant averred that the cow was injured at a place where appellant was not bound to, and could not lawfully, fence its railroad,—had been struck out on appellee's motion, in the court below; and the correctness of this decision having been properly presented to this court, it was held not be erroneous, for the reason that the matters averred in said answer could be and were given in evidence, under the general denial. This court said; “We do not find that it has been the practice to plead specially the facts going to show that the road could not be fenced.” In our opinion, the court below erred in giving this 6th instruction to the jury trying the cause.

Having arrived at this conclusion in reference to the 6th instruction, it is perhaps unnecessary for us to consider the other instructions of the court, which were complained of by the appellant. We may remark, however, that the 7th, 8th and 9th instructions of the court are applicable, almost exclusively, to a case where the stock had been killed or injured, by and through the carelessness or negligence of the company's servants, without any contributory negligence on the part of the owner of the

The City of Aurora v. Colshire.

stock: which case, as we have seen, was not made in this action by the appellee's complaint, as we have construed it. Therefore we hold, that these last instructions were improperly given to the jury in this cause.

Appellant's counsel have discussed, at some length, the character and legal effect of the evidence adduced on the trial. But as our decision will probably result in another trial of this action, and as the evidence then may differ widely from the evidence now in the record, it is not necessary, and perhaps not proper, that we should now consider and decide any question growing out of or connected with the evidence.

In conclusion, for the reasons given, we hold, that the court below erred in overruling the appellant's motion for a new trial of this action.

The judgment is reversed, and the cause is remanded, with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings.

Petition for a rehearing overruled at the May term, 1877.

THE CITY OF AURORA v. COLSHIRE.

CITIES AND TOWNS.—Streets.—Negligence.—Action for Injury Resulting from Defect in Street.—A city having so graded and filled one of her public streets, as to level it with, and include as part thereof, the top of a high wall, erected by the owners of adjoining real estate, and having negligently allowed such street to be used by the travelling public, without having erected guards or railings to prevent accidental driving or falling over such wall, a traveller, having no knowledge of such wall, without fault upon his part, fell over such embankment, thereby receiving injuries for which he brought suit against such city.

Held, that though such wall was erected upon private property, the city having adopted and used it as part of such street is liable.

Held, also, the jury having specially found that at the time of receiving the injury he had no knowledge of the condition of such street, that the

The City of Aurora v. Celahira.

judgment should not be disturbed because there was evidence that he had had some such knowledge, years previous thereto.

PRACTICE.—The rejection of a special answer alleging matters susceptible of proof under the general denial, also pleaded, is harmless.

From the Dearborn Circuit Court.

H. D. McMullen and *J. Schwartz*, for appellant.

J. D. Haynes and *J. K. Thompson*, for appellee.

BIDDLE, J.—Suit by appellee, against the city of Aurora. The complaint charges that the city raised the grade of George street above its natural surface ten feet, and knowingly and negligently left the west side of the fill perpendicular against a wall, without railing or guards, causing thereby a dangerous pitfall; and that the appellee, in pursuit of his lawful business, not knowing any thing about said elevation and pit, in passing along said street in the night-time, without any fault or negligence on his part, fell from and over said elevation, and broke his arm, and otherwise injured his body, to his damage. Wherefore, etc.

Answer:

1st. Special paragraph; and,

2d. General denial.

The special paragraph was rejected on motion, and exceptions taken. The case was then tried by a jury, on the complaint and general denial. General verdict for the plaintiff, for five hundred dollars, and answers to two special interrogatories, finding that the appellee did not know of the dangerous condition of the street when he fell, and that he undertook to pass the wall in the night-time, when it was very dark, at the time he received the injury.

After the usual motions and exceptions, necessary for the appellant to bring the case here, this appeal is taken, and alleged errors assigned.

First. The appellant complains of the rejection, on motion, of the special paragraph of answer.

There is no error in this ruling. The paragraph was

The City of Aurora v. Colshire.

nothing more than an argumentative denial of a part of what was wholly denied by the general denial.

Second. It is urged that the evidence is insufficient to sustain the verdict and findings,—and particularly that it shows contributory negligence on the part of the appellee.

We have weighed the evidence with care, and can not say that it is insufficient. There is some slight evidence, tending to show that the appellee had known something of the wall and fill, some years before he was injured, but the jury have found, that, at the time of the injury, he did not know of their existence,—and we can not say that such finding is without evidence to support it.

Third. The appellant thinks that the court gave certain instructions to the jury which were improper, and refused certain instructions which should have been given.

We have examined them with attention, and with the evidence before us, we think no available error has intervened, either in giving or refusing instructions.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The petitioners inform us that the point especially intended to be presented, upon which the appeal was advised, and upon which they mainly relied, was the fact, “That the perpendicular wall over which the appellee fell, and which is denominated a pitfall, was erected by private individuals, upon their own private lots, beyond the boundary of the street, before the city made the fill up to the wall.” This wall was built in accordance with the grade established by the city civil engineer, and the city made the fill to the top of the wall, and adopted it as part of the street.

The appellants complain that we did not decide this point in our opinion. It did not seem to us to require any elaboration or particular notice. We could not per-

Brinkmeyer v. Browneller et al.

ceive how the fact that the wrong complained of was caused on the premises of another could excuse the city. The city had adopted the space and used it as a street. If the whole street had been established over private property, without authority, and used by the city, it would not have afforded the least justification, excuse, or even palliation of the wrong of which the appellee complained. One wrong will not justify another. It was sufficient that the city adopted the private wall as a part of the street,—whether rightfully or wrongfully,—to make it liable. We are satisfied with the opinion heretofore pronounced.

The petition for a rehearing is overruled.

The opinion on the petition for a rehearing was filed at the May term, 1877.

BRINKMEYER v. BROWNELLER ET AL.

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148	451
148	452

MORTGAGE.—Indemnity for Future Endorsements.—Consideration.—Notice.—

Purchaser of Mortgaged Property.—The several joint owners of certain property executed a mortgage to another, for the purpose of securing him against any loss that he might thereafter sustain by reason of his thereafter having become, and of his thereafter, to a specified amount, becoming, an endorser of the paper of a certain one of such mortgagors; the mortgagee therein binding himself to make such future endorsements. Afterwards, such mortgagee, with notice that the mortgagor for whom he had endorsed had sold and transferred his interest in the mortgaged property to his co-mortgagors, became endorser for such mortgagor, to the amount specified, whereupon, such first endorsements by such mortgagee having been satisfied, such co-mortgagors brought an action against such mortgagee, to cancel such mortgage.

Held, that the security afforded by such mortgage, to the mortgagee, on the endorsements he had made prior to the execution of such mortgage, was a valid consideration for his agreement to make such future endorsements; and,

Held, that all of such mortgagors must be taken to have had notice of the terms and contents of such mortgage; and, therefore,

Held, that such mortgage is a valid lien upon the mortgaged property, for

Brinkmeyer v. Browneller et al.

the amount of all damages sustained by the mortgagee by reason of such endorsements made after such sale, and can not be cancelled until he has been satisfied therefor.

SAME.—Where such mortgagee has bound himself to make advances or incur liabilities, they, when made, relate back, and such mortgage will be a valid lien therefor, against subsequent purchasers or encumbrancers with either actual or constructive notice of such mortgage.

SAME.—*Optional Advances or Liabilities.*—Where there is no obligation on the part of such mortgagee, and such advances or liabilities are merely optional with him, if he make such advances or incur such liabilities, with notice that the mortgaged property has been purchased or encumbered by another, the latter is not bound by such mortgage.

From the Vanderburgh Circuit Court.

C. Denby, D. B. Kumler and S. R. Hornbrook, for appellant.

J. M. Shackelford, G. Palmer, R. D. Richardson, A. Iglehart, J. E. Iglehart, J. S. Buchanan, H. C. Gooding and C. Buchanan, for appellees.

WORDEN, C. J.—Action by the appellees, against the appellant, to procure a cancellation of certain mortgages. Answer by the appellant, to which a demurrer for want of sufficient facts was sustained, and exceptions. Judgment for plaintiffs. Error is assigned upon the ruling on the demurrer.

The material facts, on which the question here involved rests, relate to only one of the mortgages, and are, so far as stated in the complaint, as follows:

On December 29th, 1868, Emanuel Grayville, Frederick Browneller and Anton Helbling, who then owned the property as partners, executed a mortgage on certain real and personal property, to the appellant, Brinkmeyer. The condition of the mortgage is as follows, the mortgagors being named as the parties of the first part, and Brinkmeyer as the party of the second part, viz.:

“The conditions of this mortgage are such, that whereas the said party of the second part is bound and liable, as the endorser and surety of the said Anton Helbling, on a certain promissory note executed by Helbling, on the 15th

Brinkmeyer v. Browneller et al.

day of September, 1866, due twelve months after date, and made payable to the order of Maria Brinkmeyer, for the sum of twenty-four hundred dollars, (\$2,400) with ten per cent. interest from date thereof; and whereas the party of the second part is also endorser and surety for the said Anton Helbling, on a certain note, executed to Archer & Co., of the city of Evansville, which note will mature on the 2d day of January, 1869, for the sum of seven hundred and twenty dollars (\$720); and whereas the firm of A. Helbling & Co., composed of the said Anton Helbling, F. Browneller and E. K. Grayville, desire the said party of the second part to endorse and become liable upon their paper, notes, bills and acceptances to banks and individuals, to an amount not to exceed eight thousand dollars (\$8,000); and whereas the said Anton Helbling desires the said party of the second part to endorse and become liable upon his paper, notes, bills and acceptances to banks and individuals, for an amount not to exceed four thousand dollars (\$4,000); and the said party of the second part having agreed to become the endorser for said A. Helbling & Co., and the said Anton Helbling, upon their paper, notes, bills and acceptances, for sums of money not to exceed the amounts aforesaid; and whereas it may be necessary for the said party of the second part to become the endorser and surety of the aforesaid parties of the first part, in the renewal of their paper, notes, bills and acceptances aforesaid:

“Now, the purpose of this mortgage is to secure, save harmless and indemnify the said Brinkmeyer, the party of the second part, against all loss and damage, as the surety and endorser of said Anton Helbling, upon the note of Maria Brinkmeyer, for twenty-four hundred dollars, as aforesaid; and, also, to secure, save harmless and indemnify the said Brinkmeyer, the party of the second part, against all loss and damage as endorser and surety upon the paper, notes, bills and acceptances of the said A. Helbling & Co., and upon all renewals of any such notes,

Brinkmeyer v. Browneller et al.

bills and acceptances, to either banks or individuals, to an amount not to exceed eight thousand dollars, as aforesaid; and, also, to secure, save harmless and indemnify the said party of the second part against all loss or damage, as the endorser and surety upon notes, bills and acceptances of the said Anton Helbling, and all renewals of the same to banks or individuals, to an amount not to exceed four thousand dollars, as aforesaid. And for the better securing of the party of the second part, against all loss, the said parties of the first part bind themselves to keep all the property herein specified, which may be liable to be destroyed by fire, fully insured in good and solvent insurance companies, and this is made an express condition of this mortgage; and it is further agreed, that said parties of the first part have possession of all said property, and continue to carry on the foundry business, in manufacturing and selling; and, on the happening of any one of the following contingencies, the said Brinkmeyer, the party of the second part, may, at his option, institute legal proceedings to foreclose this mortgage,—or, without legal proceedings, may enter in and take possession of so much of said mortgaged personal property as he may consider necessary to indemnify and save himself harmless, as endorser and surety upon the notes, bills and acceptances of either the said A. Helbling & Co., or the said Anton Helbling, or both, which the said party of the second part has, or may hereafter, become liable for; that is to say, in case any of the notes, bills or acceptances on which the said party of the second part is now, or may hereafter become liable, are not paid or renewed at maturity, or, in case the said parties of the first part shall fail to keep said property insured as aforesaid, then a right of action, or a right to take possession, immediately shall accrue to the said party of the second part. Now, it is further agreed, that, in the event of a foreclosure of this mortgage, the said parties of the first part shall pay all costs and expenses of such foreclosure.” * * * *

Brinkmeyer v. Browneller et al.

It is alleged, that in May, 1870, the partnership was dissolved, with the knowledge of Brinkmeyer, and Helbling retired from the firm, and sold out his interest in the assets, to the remaining partners, Browneller and Grayville, and that in pursuance of the terms of the dissolution, Helbling conveyed to Browneller and Grayville, his interest in the real estate in controversy, Browneller and Grayville assuming the payment of the liabilities of their predecessors. It is also alleged, that at the same time Browneller and Grayville executed a certain mortgage to Brinkmeyer, but as this last named mortgage was not given to secure Brinkmeyer on his endorsements for Helbling, as hereinafter shown in Brinkmeyer's answer, it seems to have no importance in the case, and will not be further noticed. That Brinkmeyer had notice of the respective transactions and conveyances, at the time they were respectively had and made. That the condition contained in the mortgage of December 29th, 1868, for securing Brinkmeyer on his endorsements for Helbling, not exceeding four thousand dollars, was for the accommodation of Helbling; and that Grayville and Browneller mortgaged their share of the property, so far as it regards the purpose of such security, solely as the sureties of Helbling, as Brinkmeyer well knew. That all liabilities, of whatever kind, contemplated by the last mentioned provision, and undertaken by Brinkmeyer, for Helbling, on the footing thereof, prior to the dissolution of the partnership and the transfer, by Helbling, of his interest in the property, to Grayville and Browneller, have been fully discharged and satisfied. That the plaintiffs have frequently applied to Brinkmeyer to cancel the mortgages, so far as regards the lands now owned by the plaintiffs, which he refuses to do.

The answer of Brinkmeyer is as follows:

"Now comes the said defendant, Frederick W. Brinkmeyer, and, for his separate answer to the amended first paragraph of the complaint, says, he admits that the said mortgage in the complaint mentioned, of which a copy is

Brinkmeyer v. Browneller et al.

marked exhibit 'A,' and the said mortgage, a copy of which is marked exhibit 'F,' ought to be cancelled and satisfied; and as to the said mortgage, marked exhibit 'D,' and dated December 29th, 1868, he says the same still remains in force, and that the indebtedness thereby secured is still unpaid; that, by the terms thereof, the tracts of land therein described were mortgaged to the said Brinkmeyer, by the said mortgagors, to secure, save harmless, and indemnify the said Brinkmeyer, against all loss and damage as the surety and endorser of said Anton Helbling, upon notes, bills and acceptances of the said Anton Helbling, and all renewals of the same to banks or individuals, to an amount not to exceed four thousand dollars; and the said mortgage further provides, that the said defendant might institute legal proceedings to foreclose the same, to indemnify and save himself harmless as endorser and surety upon the notes, bills and acceptances of either the said A. Helbling & Co., which firm was composed of A. Helbling, F. Browneller and E. K. Grayville, or the said Anton Helbling, or both, which the said Brinkmeyer had then, or might thereafter, become liable for; that is to say, in case any of the said notes, bills or acceptances, on which the said Brinkmeyer was, at the time of the execution of said mortgage, liable, or might thereafter become liable, were not paid or renewed at maturity, then the right to foreclose said mortgage should immediately accrue to said Brinkmeyer. And he further says, that by the terms of said mortgage, he agreed and bound himself to become the surety of said Helbling, on his notes, bills and renewals thereof, to the amount of four thousand dollars; and said Brinkmeyer says, that in consideration of the delivery to him of said mortgage, and for no other consideration whatever, and in pursuance of said agreement in said mortgage, and on the demand of said Anton Helbling, he endorsed and became the surety of said Helbling upon notes and bills in the sum of four thousand dollars, the whole of which, (except about four hundred

Brinkmeyer v. Browneller et al.

dollars still outstanding,) as per bill of particulars filed herewith as part hereof, and marked exhibit 'A,' said Brinkmeyer has been compelled to pay, and did pay, as the surety of said Anton Helbling, whereby a right of action has accrued to him upon the mortgage aforesaid, for the sum of four thousand dollars; and said Brinkmeyer says, that said sum of money is still due to him, from Helbling, wherefore he asks judgment," etc.

The case made by the pleadings may be stated briefly as follows:

Grayville, Browneller and Helbling were the owners of certain property, and they executed a mortgage upon it, to Brinkmeyer, for the purpose, amongst other things, of securing the latter against any loss that he might sustain by reason of becoming thereafter the endorser of the paper of Helbling, to the amount of four thousand dollars, Brinkmeyer agreeing, for a valuable consideration, to endorse for Helbling to an amount not exceeding the sum named.

Afterwards, Helbling conveyed his interest in the mortgaged premises, to Grayville and Browneller, of which Brinkmeyer had notice. After this, Brinkmeyer, in pursuance of the original agreement, and upon the demand of Helbling, endorsed for the latter to the amount of four thousand dollars, the most of which he has been compelled to pay, and the residue of which is still outstanding.

The question arising is, whether Brinkmeyer has a lien upon the mortgaged premises, by virtue of the mortgage, as an indemnity against the loss and liability incurred by endorsing for Helbling, after the latter had transferred his interest in the mortgaged premises to Grayville and Browneller.

We shall not enter upon any lengthy discussion of the general doctrine applicable to mortgages given to secure future advances. The following propositions, however, we think, are settled by the authorities:

First. Where the mortgagee has bound himself to make

Brinkmeyer v. Browneller *et al.*

advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or encumbrancers with notice, actual or constructive, of the mortgage.

Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent encumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or encumbrancer. See 11 Am. Law Reg., N. S., 273, and authorities there cited.

The case of *Ladue v. The Detroit, etc., R. R. Co.*, 13 Mich. 380, is an exhaustive one, in which the authorities are extensively examined, both by the counsel and the court. CHANCELLOR KENT (4 Kent Com. 175) says :

“So, a mortgage or judgment may be taken, and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance, with notice of the agreement.”

But the appellees insist that there was no valid consideration for Brinkmeyer's agreement to endorse for Helbling, and that it was entirely optional with him to do so or not, and, therefore, that the case falls within the second proposition above stated. The case must turn upon this question.

We think, however, there was an ample and valid consideration for Brinkmeyer's promise, appearing on the face of the transaction, which was the indemnity he acquired by the mortgage, against his liability on the note to Maria Brinkmeyer and the note to Archer & Co. Brinkmeyer, by his promise to endorse, in the future, for the firm of A. Helbling & Co., and for A. Helbling, as stipulated for, obtained an indemnity against an existing

Brinkmeyer v. Browneller et al.

liability, which he did not otherwise possess. By the mortgage, he obtained, not only "security for the future," but, "indemnity for the past." Without the mortgage, if Brinkmeyer had been compelled to pay the notes to Maria Brinkmeyer and Archer & Co., he could only have looked to Helbling for repayment; but, by the mortgage, he obtained a lien, as an indemnity, upon the property mortgaged, belonging to the entire firm. The security which he obtained in respect to his previous liability was an ample consideration for his agreement to endorse in the future for both the firm and for Helbling.

We have considered the case as if the firm had conveyed the property to a third person, having notice, actual or constructive, of the mortgage, before Brinkmeyer had endorsed for Helbling. We need not, therefore, determine whether Grayville and Browneller occupy the same position in respect to the property, that a third person would, if he had bought it from the firm, with notice of the mortgage. They occupy no better position, to say the least. In respect to notice, they, having with Helbling made the mortgage, must be taken to have had notice of it, as well as of its terms and contents.

We are of opinion, on the case made, that the appellant has a lien on the property, as against the appellees, by virtue of the mortgage, as an indemnity or security for whatever he may have paid, or for whatever he may be liable, on his endorsements for Helbling, as set up in the answer, and that the court erred in sustaining the demurrer to the answer.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled at the May term, 1877.

Talbot v. Goddard et al.

TALBOTT v. GODDARD ET AL.

MECHANICS' LIEN.—Material Man.—Pleading.—Evidence.—To establish and foreclose a lien upon a building, for the value of materials used in the construction thereof, the material man must aver and prove, in addition to averment and proof of the notice required by the statute, that such materials were furnished by him expressly for such building.

SAME.—It is not sufficient in such case, that the material man, in furnishing materials for the construction of several different buildings, on a general account with the contractor, has kept an itemized statement of the different materials used in each of said buildings, as the same were distributed by the direction of the contractor or owner.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

A. G. Porter, W. P. Fishback and G. T. Porter, for appellees.

BIDDLE, J.—Samuel Goddard, Samuel Goddard, Jr., and Thomas Goddard, partners under the name and style of Goddard & Sons, brought this complaint against Charles H. Talbott, Edward Van Kuren, Henry Helm, Conrad Russe, Victor Plogsterth, George W. Hill and David D. Long, to foreclose a mechanic's lien against property owned by Charles H. Talbott. George W. Hill and David D. Long, partners under the style of Hill & Long, brought their cross-complaint, in the same proceedings, against Talbott, Van Kuren, Helm, Russe and Plogsterth, their codefendants, to foreclose a mechanic's lien upon the same property. The pleadings need not be stated, as no question arises upon them. The names of the parties, and the respective demands they claim, will sufficiently appear in the following special findings by the court:

"1st. That on and prior to the 1st day of July, 1873, the defendant Charles H. Talbott was the owner of the following real estate, in Marion county, in the State of Indiana, to wit: Lot number six, and six feet and three

Talbott v. Goddard et al.

inches off of the south side of lot number five, in A. L. Roache's Addition to the City of Indianapolis, as described in the complaint of the plaintiff and the cross-complaint of Hill & Long.

"2d. That on or about the 1st day of July, 1873, the said Charles H. Talbott, being then the owner of said real estate, entered into a contract with the defendant Van Kuren, to construct a new, two-story, brick dwelling-house, and stable, on said real estate, the said Van Kuren agreeing to furnish all the materials, and construct said house, for a certain price agreed upon between the said Talbott and the said Van Kuren, to be paid by the said Talbott, to the said Van Kuren, as the work on said house and stable progressed.

"3d. That the plaintiffs furnished stone materials, that were used in the construction of said dwelling-house, of the value of three hundred and sixteen dollars and four cents; said stone was furnished at the request, and on the order, of said Van Kuren, the contractor with said Talbott, and used in the said dwelling-house; and the said plaintiffs, before the expiration of sixty days after the completion of said house, to wit, before said house was completed, filed their notice of intention to hold a lien, for the value of said materials, on said real estate, and on the house erected thereon, in the recorder's office of Marion county, and caused the same to be recorded, in all things as alleged in the complaint.

"4th. That the plaintiffs have not been paid for said materials, so used in said house, or for any part thereof; and said Talbott has fully paid the said Van Kuren, for all of the work done, and for said materials furnished and used in the construction of said house, in all things according to the terms of the contract between the said Talbott and Van Kuren, and that such payment was made by said Talbott, to said Van Kuren, before the notice of the plaintiffs was filed in the recorder's office, as before stated.

Talbott v. Goddard et al.

“5th. That the cross-complainants, Hill & Long, furnished lumber and materials, as set out in their complaint, which were used in the construction of said dwelling-house and stable on the defendant Talbott's real estate. That they commenced furnishing said lumber and materials on the 2d day of July, 1873, and the last of said lumber and materials were furnished on the 17th day of September, 1873, and that they filed their notice of lien in the recorder's office of Marion county, within sixty days after said materials were furnished and before the completion of said dwelling-house and stable, or either of them, and caused said notice to be duly recorded, on the 8th day of November, 1873, as alleged in the cross-complaint of the plaintiff; and that said lumber and materials, so furnished by the cross-complainants, Hill & Long, and [were?] of the reasonable value of nine hundred and seventy-four dollars and thirteen cents.

“6th. That said Van Kuren is a carpenter and builder, and was, at the time he was engaged in constructing the said dwelling-house and stable of the defendant, engaged in constructing twelve other and different buildings, for other and different parties, in said city of Indianapolis, under contracts with said parties to construct said buildings and furnish all the materials therefor; and at the time of the making of the contract with the defendant Talbott, the said Van Kuren was indebted to the said cross-complainants, Hill & Long, on general account, for lumber and materials, in the sum of three thousand dollars. That during the progress of the work upon the defendant Talbott's house, and during the time the cross-complainants were furnishing the lumber in their complaint mentioned, they were furnishing other lumber and materials for the other and different buildings so being erected by said Van Kuren; that all of the lumber, so furnished by the cross-complainants and used in the defendant Talbott's dwelling-house and stable, together with the lumber furnished for the other buildings being erected at the same time by the

Talbot v. Goddard et al.

said Van Kuren, was furnished on the order of said Van Kuren, and charged in a general account, kept by said Hill & Long, against the said Van Kuren; the said Hill & Long keeping a memorandum account of the different houses and places where said lumber was delivered, as ordered by said Van Kuren, said Van Kuren having directed [in] each instance the building for which the same was to be furnished.

“7th. On the 1st day of July, 1873, the said Hill & Long had a settlement of their general account, and Van Kuren, being indebted to said Hill & Long, in about the sum of three thousand dollars, made his three several notes to said Hill & Long for about the sum of one thousand dollars, payable, respectively, in forty-five, sixty and seventy-five days, each. No lumber furnished and used in the defendant Talbot's house was included in the amount of said notes. On the 1st day of August, 1873, the said Hill & Long and the said Van Kuren had another settlement, and the said Van Kuren was at that time indebted to the said Hill & Long, in the further sum of twenty-eight hundred dollars, for which the said Van Kuren executed his note or notes, payable to the said Hill & Long, and the value of the lumber furnished to the said Van Kuren, and used in the construction of the house of the defendant Talbot, during the month of July, was included in said note or notes, so made on the 1st day of August, 1873. The said notes so made, both on the 1st day of July and on the 1st day of August, 1873, were payable in a bank in the State of Indiana, and were by said Hill & Long endorsed and negotiated.

“8th. That on the 6th day of July, 1873, the defendant Talbot paid the said Van Kuren the sum of six hundred dollars, and on the 13th day of July the further sum of six hundred dollars, and on the 19th day of July, the further sum of three hundred dollars, and on the 26th day of July, the further sum of two hundred dollars, and on the 2d day of August, the further sum of three hundred and

Talbott v. Goddard et al.

fifty dollars, and on the 9th day of August, the further sum of six hundred dollars, and on the 16th day of August, the further sum of nine hundred dollars, and on the 23d day of August, the further sum of eight hundred dollars, making a total of four thousand three hundred and fifty dollars. That the amount so paid by Talbott, to Van Kuren, was the full, reasonable value of all the work done, and materials furnished by said Van Kuren; and said Van Kuren abandoned the work under his contract, and failed to complete said dwelling-house and stable, but not until all said materials had been furnished as aforesaid.

“9th. That on the 6th day of July, Van Kuren paid at the bank, on one of the notes before that time given by Hill & Long, the sum of eight hundred dollars, and on the 24th day of July, he paid at the bank, on said notes, the further sum of eleven hundred dollars, and afterwards, and prior to the 20th day of September, he paid Hill & Long, on said notes, a further sum of fifteen hundred dollars. That the said payments were made on notes transferred and held by the bank, as before stated, and neither Hill & Long nor the bank had any knowledge from whom the money was received by Van Kuren. That a part of the money was procured from Talbott, but how much is not disclosed by the evidence, and the said payments were applied to the extinguishment of the indebtedness of Van Kuren to Hill & Long, which had accrued before they commenced furnishing any lumber to be used in constructing the house of Talbott.

“10th. The residue arising on said notes, after allowing credits for the payments aforesaid, has [not] been paid by said Van Kuren, and that said Hill and Long, before the commencement of this suit, were compelled, as endorsers, to take up said notes, and pay the balance owing on the same to said bank by which they have been discounted.

“11th. As conclusions of law, arising on the foregoing facts, the court finds, that the plaintiffs, Samuel Goddard,

Talbot v. Goddard et al.

Samuel Goddard, Jr., and Thomas Goddard, are entitled to have and receive, of defendant Talbot, the sum of three hundred and sixteen dollars and four cents, and that they have and hold a lien upon the real estate described in their complaint, and the buildings thereon, to secure the payment of said sum of money, and that they are entitled to a decree for the enforcement and foreclosure of said lien.

"12th. As further conclusion of law, arising on the foregoing facts, the court finds that the cross-complainants, Hill & Long, are entitled to have and receive, of the defendant Talbot, the sum of nine hundred and seventy-four dollars and thirteen cents, and that they have and hold a lien upon the real estate and the buildings thereon, described in their cross-complaint and set out in the findings herein, to secure the payment of said sum of money, and that they are entitled to a decree for the foreclosure and enforcement of said lien."

The appellant excepted to each and all of the conclusions of law, as found by the court. The court rendered judgment in accordance with the findings of facts and conclusions of law, above stated, and the appellant appealed to the court in general term, wherein the judgment at special term was in all things affirmed. From the general term he appealed to this court.

It is contended by the appellant that the facts, as found by the court, do not show that the materials furnished by the claimants were furnished for the particular building against which the lien is sought to be established; that it is not sufficient to show that the materials were furnished and used in the building, but that it must appear that they were furnished for the building, and with the view of securing a lien thereon.

This point was directly presented to this court in the case of *The City of Crawfordsville v. Barr*, 45 Ind. 258, wherein it was held, OSBORN, J., delivering the opinion of the court, that, "Where materials are furnished for a building, they are furnished on the credit of the building,

Talbot v. Goddard et al.

and when the statute is complied with, a lien is acquired. But it is necessary to aver and prove that such materials were furnished for the building sought to be charged with the lien. It is not sufficient to aver that the materials were furnished to the contractor or owner, and that they were used in the construction of the building." The same ruling was adhered to in the case of *The City of Crawfordsville v. Johnson*, 51 Ind. 397. See, also, *Ogg v. Tate*, 52 Ind. 159. And the same question was fully considered in the case of *Crawford v. Crockett*, ante., p. 220, and carefully reconsidered on a motion for rehearing, and deliberately settled in accordance with the above decisions.

The case of *Barker v. Buell*, 35 Ind. 297, in a single sentence spoken by the court, but not in reference to the questions involved in this case, might seem to favor the appellees; but the main point contested in that case was the sufficiency of the notice to the defendant. It does not support the appellees, and is not in serious conflict with the subsequent decisions of the question before us. *Colter v. Frese*, 45 Ind. 96, also cited by the appellees, supports our ruling in the present case. It was therein held, that "those performing labor on, or furnishing materials for, the building are entitled to a lien, as provided for." Nor does this case support the views of the appellees in any respect.

The following authorities, from sister States, are in full harmony with the decisions of this court upon the same question. *Cotes v. Shorey*, 8 Iowa, 416; *Chapin v. The Persse and Brooks Paper Works*, 30 Conn. 461; *Hill v. Bishop*, 25 Ill. 349; *Beckel v. Petticrew*, 6 Ohio State, 247; *Esslinger v. Huebner*, 22 Wis. 632; *Gorgas v. Douglas*, 6 S. & R. 512.

We must hold the law as settled in this State, that to entitle a material man to a lien upon any building, he must show that the materials were furnished for the particular building upon which he seeks to obtain a lien. It

Talbot v. Goddard & al.

is not sufficient that he has furnished materials which have been used in the building; he must show that they were furnished for that particular building. If merely furnishing the material, which was afterwards used in a building, was sufficient to establish a lien upon it, every lumberman, who cuts his tree in the forest, or quarryman, who digs his rock from the earth, or brickmaker, who sells his brickkiln, by tracing his material into any building wherein it might happen to have been used, could establish a lien upon it, although he never had any knowledge of the contractor, the building, or its owner, and although the materials might have passed through the hands of many dealers, before it was ultimately used. Such a rule would very much embarrass real estate, and render clear titles very difficult to establish. Indeed, under such a law, no one could be sure that he was the sole proprietor of his own house.

The question remains to be examined, whether the facts found in the case before us bring the rights of the parties within this rule of law. As to Goddard & Sons, the facts show that they furnished materials to the builder, which were used in the construction of the appellant's building, but they do not show that they were furnished for that particular building. In our opinion, they have not established their lien. With reference to Hill & Long, the facts also show that they furnished materials to the builder, which were used in the construction of the appellant's house; and show that the same builder, at the same time, was engaged in the erection of twelve other different buildings, for other parties, in the same city, for which Hill & Long were also furnishing materials; that the materials for the several buildings were delivered to the builder, on a general account; that Hill & Long kept a memorandum account of the different houses where said materials were delivered, as ordered by the builder in each instance. As the materials were all delivered to the builder, on a general account between him and the furnishers, it does not appear

Nicholson v. The Louisville, New Albany and Chicago R. W. Co.

to us that any particular part of them were designated for any one particular house of the thirteen which the builder was then erecting, and for which the claimants were furnishing materials—more than they were designated for any other of the thirteen houses, only as they happened to be distributed around amongst them, according to the directions of the builder. At least, the facts found do not clearly show that Hill & Long furnished materials particularly for the erection of the appellant's house, but, merely, that they furnished materials, generally, to the builder, for several houses, who used a part of them in the erection of the appellant's house; and as the affirmative must be shown by them, we think they have failed to establish their lien. Indeed, the finding does not anywhere show that the materials furnished by Hill & Long, which went into the appellant's building, were the same materials upon which the balance due them was founded, nor how much of the general materials went into the buildings of the appellant.

No error having been assigned against the judgment of the Goddards, the judgment as to Hill & Long is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled at the May Term, 1877.

NICHOLSON v. THE LOUISVILLE, NEW ALBANY AND CHICAGO
R. W. Co.

PLEADING.—*Railroad.*—*Mortgage Indemnity.*—*Trust and Trustee.*—*Purchaser of Property Encumbered.*—*Action to Enforce Encumbrance.*—The property of a railroad company having been conveyed to a trustee, for the benefit of the holders of a bonded indebtedness of such road, by a trust-deed, or mortgage, providing that he should receive the earnings and pay the running expenses of such road, which road, with all its appurtenances,

Nicholson v. The Louisville, New Albany and Chicago R. W. Co.

having been sold to such bond-holders, to satisfy such indebtedness, was reorganized and run under a new corporate name; whereupon the holder of a judgment which had been obtained against such former company, during the management of such trustee, for killing stock, brought suit against such company to obtain the amount of such judgment, alleging that such trustee had failed to pay the same, but had paid all the earnings of such road, to such bond-holders.

Held, on demurrer, the complaint not alleging what amount, if any, of the earnings of such road had ever been received by such trustee, that it is insufficient.

PRACTICE.—Demurrer.—Defect of Parties.—A demurrer to a complaint, alleging as cause a defect of parties defendants, should point out whom the additional party defendant should be.

From the Montgomery Circuit Court.

BIDDLE, J.—The complaint is as follows:

“Allen T. Nicholson, plaintiff, complains of the Louisville, New Albany and Chicago Railway Company, defendant, and says, that on the 24th day of March, 1870, by the consideration of the circuit court in and for the county of Montgomery, in the State of Indiana, he recovered a judgment against The New Albany and Salem Railroad Company, for the sum of one hundred and seventy-five dollars, the same being upon a complaint for cattle killed by an engine and cars running on the road of said company, which said judgment is now in full force, wholly unpaid, and not appealed from; that at the time said stock, for the killing of which said judgment was recovered, was run upon and killed by the engine and cars running on said road, the said road was being run and operated by one Charles E. Bill, as alternate trustee under a mortgage, or trust-deed, executed by said railroad company, to one Dow D. Williamson, and his alternate, said Bill, (the said Williamson being dead) to secure the payment of the bonds issued by said company, which said mortgage, or trust-deed, among other things, made it the duty of the said Dow D. Williamson, and said

Nicholson v. The Louisville, New Albany and Chicago R. W. Co.

Bill, to run and superintend said road, and, after first paying the expenses of running and keeping said road in order, out of the earnings of the same, to pay the said bond-holders the interest and principal of their bonds; that the said Charles E. Bill, alternate of Dow D. Williamson, instead of paying for said stock, so killed upon said road, out of the earnings of said road, paid the whole of the earnings of said road to said bond-holders, and left the judgment of plaintiff wholly unpaid; the debt for the killing of said stock being a part of the expenses of running and operating said road, and all such debts having been so regarded and treated by the said Dow D. Williamson, said Charles E. Bill and said bond-holders; that, subsequently to the rendition of said judgment, said New Albany and Salem Railroad was sold, together with a large amount of personal and real property acquired by said New Albany and Salem Railroad Company, after the making and recording of said mortgage, or trust-deed, to the said Dow D. Williamson, and said Bill, his alternate, by order of the United States District Court, for the benefit and upon the application of said bond-holders, they becoming the purchasers thereof for a mere nominal sum; and the said bond-holders now own and operate said road, under the name and style of the Louisville, New Albany and Chicago Railway; the said bond-holders, after having so purchased said road, and succeeded to all the property, rights, franchises and obligations of the said New Albany and Salem Railroad Company, organizing themselves into a new corporation, known as the Louisville, New Albany and Chicago Railway Company, pursuant to the statute of the State of Indiana, in such case made and provided. Wherefore," etc.

To this complaint a demurrer was filed, alleging as grounds:

- 1st. The insufficiency of the facts stated; and,
- 2d. A defect of parties defendants.

Nicholson v. The Louisville, New Albany and Chicago R. W. Co.

The demurrer was sustained, exceptions taken, and judgment rendered on the demurrer.

It is enough to say that this complaint does not show, what amount of the earnings of said road came to the hands of the trustee, out of which the debt claimed should have been paid; and whether any such earnings so came to his hands, or whether there ever were any such earnings, is left wholly to inference; there are no such averments, without which, the complaint is insufficient. And in pointing out only these defects, we must not be understood as deciding, or even implying, that the complaint is sufficient in other respects.

Perhaps the second ground of demurrer is not sufficiently specific in its statements. It does not clearly show what additional party ought to have been made defendant.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The counsel for the appellant has filed a petition for rehearing, in which he uses language unprofessional and disrespectful. The following are two sentences quoted from his petition:

“We doubt if there is a man in the State, no matter how common his understanding, if he is not an absolute idiot, who would fail to understand, at once, from the language in the complaint, that the trustee had the earnings of the road in his possession or under his control.

“It may be a pleasant thing for the courts to thus play shuttle-cock with a man's rights, but it is not much amusement for those who have the expenses to pay.”

We know nothing of the counsel, except his name, signed to the petition: nor would it make the slightest difference if we did, for it is not a personal question, but one concerning the professional relation of a lawyer, to the official duty of a court. Before a court, every lawyer stands upon the same level of equal and exact right, and

Nicholson v. The Louisville, New Albany and Chicago R. W. Co.

must submit to the same standard of equal and exact duty; and we acknowledge, as resting upon ourselves, the onerous obligation and solemn duty imposed by a sacred oath—by which we are required to write down every official word we say, and every official act we do, and lay them before a learned and honorable profession, and which must be printed, and published to the world—to do equal and exact justice, to all men, under the laws and the constitution. It would, therefore, ill become us to swerve from this obligation, or abandon this duty, on account of the unfortunate temper of counsel.

If the counsel, in this case, when the court below so properly held the complaint insufficient, had amended it,—which would have cost but a few cents, and not an hour's delay,—his client would have gained his rights in the case, if he has any, long ago; but instead of following that plain duty and business-like course, his counsel, either through ignorance or stubbornness,—for it must have been one or the other—brought his case to this court, upon an insufficient complaint, and because we, as in duty bound, affirm the decision below, he talks flippantly of the courts playing shuttle-cock with man's rights, at the expense of the parties. It is very evident that his client has suffered needless expense and needless delay,—not by the fault of the court below, nor of this court, but,—by the error of his counsel; and we think there needs to be no severer rebuke to the counsel than a statement of his own conduct.

In the relation between this court and the profession, we do not expect to hear any such language again.

The petition for a rehearing is overruled.

The Ohio and Mississippi R. W. Co. v. Vickery et al.

THE OHIO AND MISSISSIPPI R. W. CO. v. VICKERY ET AL.

SUPREME COURT.—*Practice.*—*General Finding.*—*Special Finding.*—Where, from the evidence given on the trial of a cause, wherein a general finding has been rendered, the Supreme Court would not disturb a special finding, supporting such general finding, had it been made, upon a particular point urged against the latter, such point will not be considered.

From the Knox Circuit Court.

W. H. De Wolf and *C. A. Beecher*, for appellant.

G. G. Reily and *W. C. Johnson*, for appellees.

WORDEN, C. J.—This was an action, by the appellees, against the appellant, to recover damages for the negligent and careless manner of carrying and handling three barrels of molasses, which the defendant, as was alleged, undertook, as a common carrier, to transport from the City of New York, to Vincennes, Indiana, whereby the barrels were broken and a quantity of the molasses spilled and lost.

The cause was tried by the court, who found for the plaintiffs and assessed their damages at twenty-nine dollars and sixty-one cents.

The case is before us on the evidence, which, as we think, was sufficient to justify the finding.

The point is made by the appellant, that by the terms of the bill of lading, that company was not responsible for any injury to the barrels, which happened before they were received by her from the company whose road connected with that of the appellant, at Cincinnati, Ohio. We shall not examine, or express any opinion upon, the legal proposition stated. The finding of the court was a general one, and we can not know whether the court was of opinion that the injury to the barrels happened before or after they were placed upon the appellant's road at Cincinnati. If the court had found, specially, that the injuries occurred after the barrels had been placed upon the appellant's road at Cincinnati, the evidence, taking it alto-

Whitworth v. Blakey, Assignee, etc.

gether, was such that we could not, under the well established practice, disturb the finding.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled at the May Term, 1877.

WHITWORTH v. BLAKEY, ASSIGNEE OF THE MOUNT VERNON
MASONIC HALL COMPANY.

From the Posey Circuit Court.

A. P. Hovey and *G. V. Menzies*, for appellant.

J. H. Laird, for appellee.

NIBLACK, J.—The appellee sued the appellant, in the court below, and in his complaint alleged that "The Mount Vernon Masonic Hall Company" was a corporation, organized under the laws of this State, for the purpose of erecting a building, to be used in part as a Masonic lodge. That the said appellee was the assignee in bankruptcy of such corporation. That before the organization of said corporation, and in the preliminary articles of association thereof, the appellant subscribed for ten shares, of twenty dollars each, of the capital stock of said corporation, agreeing to pay two hundred dollars therefor. That said articles of association had been duly executed and acknowledged, and duplicates thereof filed in the recorder's office of Posey county, and in the office of the Secretary of State, respectively, and that the appellant, although often requested, had failed, neglected and refused to pay said sum of two hundred dollars.

There was an issue, a trial by the court, and a finding and judgment for the appellee.

This case, in all its essential particulars, including the questions reserved in the record by the appellant, is a parallel one to the case of *Nelson v. Blakey, Assignee*, 54 Ind. 29, decided at the present term. The same question, as to the admissibility in evidence, on behalf of the appellee, of a "certified copy of a certified copy" of the articles of association above referred to, arose on the trial of this case, in the same form as it did in that, and, upon the authority of that case, the judgment in this case must also be reversed.

The judgment is reversed, at the costs of the appellee, and the cause remanded for a new trial.

Haub v. Weathers.—The Town of Brazil v. Johnson *et al.*, Etc.

HAUB v. WEATHERS.

From the Jackson Circuit Court.

E. C. Devore, for appellant.

W. K. Marshall, for appellee.

PERKINS, J.—Suit by the appellee, against appellant, charging the latter with having sold intoxicating liquors to her husband, whereby he was made drunk, to her loss, damage, and injury in means of support.

Answer in general denial; trial by the court; verdict and judgment for the appellee, for fifty dollars; new trial denied. The only assignment of error is, that the court erred in overruling the motion for a new trial; and the only point argued by counsel, in this court, is, that the finding of the court below was not justified by the evidence.

We have read the evidence, and we think, that, without a departure from the rule in acting upon causes resting on the weight of evidence, we can not disturb the judgment.

The judgment is affirmed, with costs.

THE TOWN OF BRAZIL v. JOHNSON ET AL.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellees.

HOWK, J.—This action presents precisely the same questions, and none other, for our consideration and decision, as those which are considered and decided in the case of *The Town of Brazil v. Kress*, *ante*. p. 14; and for the reasons given in the opinion in that case, this action must be decided as that was decided.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to the court below, to sustain appellant's demurrer to appellees' complaint, and for further proceedings in accordance with the opinion in the case cited.

THE TOWN OF BRAZIL v. TALLEY.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

HOWK, J.—The questions decided by this court, in the case of *The Town of Brazil v. Kress*, *ante*, p. 14, are decisive also of the material questions involved in the record of this cause; and, for the reasons given in the decision of the case cited, this action must be decided as that was decided.

Judgment reversed, at appellee's costs.

The Town of Brazil v. Michaelree, Etc.

THE TOWN OF BRAZIL v. MICHAELREE.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

Howk, J.—Appellant's assignment of errors in this action presents precisely the same questions, for our consideration and decision, as those which were considered by this court and decided in the case of *The Town of Brazil v. Kress*, ante, p. 14, and for the reasons there given, this action must be decided in the same way that was decided.

Judgment reversed, at appellee's costs.

THE TOWN OF BRAZIL v. MCCOY.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

BIDDLE, J.—This cause is, in all respects, similar in principle to *The Town of Brazil v. Kress*, ante, p. 14. The judgment is therefore reversed, with costs, and the cause remanded, etc.

THE TOWN OF BRAZIL v. GENTER.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

WORDEN, C. J.—The judgment below in this cause is reversed, with costs, for the reasons given in the case of *The Town of Brazil v. Kress*, ante, p. 14.

THE TOWN OF BRAZIL v. JOHNSON.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

PERKINS, J.—The judgment below in this cause is reversed, on the authority of *The Town of Brazil v. Kress*, ante, p. 14, the same questions being involved in this, as in that, case.

Judgment is reversed, with costs, and cause remanded, etc.

The Town of Brazil v. Michaelree, Etc.

THE TOWN OF BRAZIL v. MICHAELREE.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

BIDDLE, J.—The present cause is the same in all legal respects as *The Town of Brazil v. Kress*, ante, p. 14.

The judgment is reversed, with costs, cause remanded, etc.

THE TOWN OF BRAZIL v. MCGUIRE ET AL.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellees.

WORDEN, C. J.—The judgment below in this cause is reversed, with costs, for the reasons given in the case of *The Town of Brazil v. Kress*, ante, p. 14.

THE TOWN OF BRAZIL v. INGOLDSBY.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellee.

PERKINS, J.—The judgment in this cause is reversed on the authority of *The Town of Brazil v. Kress*, ante, p. 14, the two cases depending upon the same questions.

Judgment is reversed, with costs, and cause remanded, etc.

THE TOWN OF BRAZIL v. KRESS ET AL.

From the Clay Circuit Court.

S. W. Curtis and *B. S. Henderson*, for appellant.

G. A. Knight and *I. M. Compton*, for appellees.

BIDDLE, J.—The case of *The Town of Brazil v. Kress*, ante, p. 14, settles the decision in this cause. The two cases are, in all respects, the same in principle.

The judgment is reversed, with costs, and cause remanded, etc.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1877, IN THE
SIXTY-FIRST YEAR OF THE STATE.

55	515
131	519
55	515
142	458
143	244
55	515
145	594
55	515
150	153
150	509

STILZ ET AL. v. THE CITY OF INDIANAPOLIS ET AL.

CITY.—Constitutional Law.—Annexing Contiguous Lands.—The act of March 14th, 1867, providing “for the incorporation of cities,” etc., in so far as it authorizes a board of commissioners, on the petition of the common council of a city, to annex to such city territory contiguous thereto, (1 R. S. 1876, p. 311, secs. 85, 86) is constitutional.

SAME.—Eminent Domain.—The authority conferred by such act, upon a county board, to so annex to a city territory contiguous thereto, is not founded upon the right of eminent domain.

SAME.—Common Law.—Statute.—The power of the proper authority to alter the boundaries of a civil corporation, or annex thereto contiguous territory, existed at common law, but in this State is statutory.

SAME.—Petition.—Common Council.—Signatures.—The petition to the county board, by the mayor and common council of a city, asking for the annexation to such city of contiguous territory, need not be signed unanimously by the members of such council; the signatures thereto of a number of such members exceeding two-thirds being sufficient.

SAME.—Description of Territory to be Annexed.—Where the contiguous territory, which it is desired to annex to a city, is described in the petition

Stilz et al. v. The City of Indianapolis et al.

by the divisions formed by the congressional surveys, and by subdivisions thereof, capable of being ascertained, such description is sufficient.

SAME.—Plat.—When Filed.—Amendment.—The plat of the land proposed, in the petition therefor, to be annexed to a city, need not be filed at the time such petition is filed, but may be filed thereafter at any time before the county board has finally acted upon such petition, even over the objection of a remonstrant.

SAME.—Filing Petition.—When.—Notice of.—The statute authorizing such petition does not require that it shall be filed any specified period prior to the first day of the session of the county board at which it is intended to present it, but thirty days' notice of such intention must be given.

SAME.—Survey.—If such petition contain a specific description of the premises asked to be annexed, and the plat filed therewith contain a copy of an actual established survey thereof, though theretofore made for another purpose, a survey for the purposes of such petition is unnecessary.

SAME.—Power of the City to Tax Farm Land.—Injunction.—The power of a city to tax, for her municipal purposes, a tract of farm or garden land, contiguous to such city, can not be called in question in an action by the owner thereof, against such city and a county board, to enjoin them from executing an order of such board, annexing such land to such city.

From the Marion Superior Court.

N. B. Taylor, F. Rand, E. Taylor, C. H. Test and J. Coburn, for appellants.

C. W. Smith and R. O. Hawkins, for appellees.

BIDDLE, J.—Proceedings to annex certain territory to the city of Indianapolis, under the authority of sections 85 and 86 (1 R. S. 1876, p. 311) of the act of March 14th, 1867, touching the incorporation of cities, and prescribing their powers. As much of the act as affects the question before us, provides as follows:

“Sec. 85. * * * If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and, at the same time, present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some

Stilz et al. v. The City of Indianapolis et al.

newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed.

“Sec. 86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation, and if, after inspection of the map and of the proceedings had in the case, such board is of opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book, specifying the territory annexed, with the boundaries of the same, according to the survey, and they shall cause an attested copy of entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this State * * * * *.”

By the authority of these sections, the common council of the city of Indianapolis petitioned to the board of commissioners of Marion county, to annex the following territory to said city, to wit:

“The north-east quarter of section thirteen (13), township fifteen (15), north, of range three (3), east, except the following tracts: thirty (30) acres off of the north end of the east half thereof, as subdivided by Beaty, administrator of Jacob Birkenmeyer; also, that part commencing at the south-west corner of said quarter section, thence east 30.90 chains, thence north 1.30 chains, thence west to the west line thereof, thence south 1.30 chains to the place of beginning: also, the tract described as follows, to wit, commencing 1.30 chains north of the south-west corner of said quarter section, thence east 15 chains, thence north seven hundred and four feet, thence west to the west line of said tract, thence south seven hundred and four feet to the place of beginning.”

The petition sets forth that the land lies contiguous to the city of Indianapolis; that it has never been platted and laid off into lots; and that the owners will not consent, in writing, that the same may be annexed to said

Stilz et al. v. The City of Indianapolis et al.

city; that the vicinity adjacent to said territory is thickly populated, and is greatly in need of streets, sidewalks and alleys, which ought to be opened and constructed through and upon said territory; that the public convenience and health require that said lands should be under the jurisdiction of said city, in order that the same may be drained by sewers and ditches, and lighted with gas; that the vicinity in and around the territory being thickly populated, it is necessary that said city should have jurisdiction over the same, for the purpose of enforcing ordinances for the protection of the property and the persons of the citizens.

The petition was authorized by a resolution of the common council of the city of Indianapolis, by an affirmative vote of twenty-three councilmen out of twenty-four; negative, none; and was signed by the mayor and twenty-three councilmen. Public notice was given of its pendency. After the petition was filed and public notice given, the board of commissioners, over the objection of the appellants, who were remonstrants and admitted to defend against the proceedings, allowed the city to amend the petition by annexing thereto a plat of the lands described. The remonstrants then moved the board to dismiss the petition, for various reasons assigned, which will be examined in the course of this opinion. The motion was overruled, whereupon the remonstrants denied the matters set forth in the petition, and alleged various reasons why the annexation should not take place. The case was then submitted to the board, on the petition and answer and the evidence adduced by the parties; and the board granted the prayer of the petition. The remonstrants moved the board for a new trial, assigning several causes therefor, but their motion was overruled.

At this stage of the case the remonstrants brought the present action, setting out in their complaint the foregoing proceedings of the council and board, and alleging additional facts contravening the petition, and that the

Stils et al. v. The City of Indianapolis et al.

lands sought to be annexed were only fit for gardening and farming purposes, and were so used; that the annexation will result in imposing additional burdens on the appellants by the city government, etc., praying for an injunction.

A temporary restraining order was granted.

Upon their appearance to the complaint, the appellees filed their demurrer, alleging as ground the want of facts to constitute a cause of action, which was sustained and exceptions reserved. The appellants elected to stand on their complaint, and the court found for the defendants. An appeal was taken to the superior court, in general term, wherein the judgment at special term was affirmed, and thence to this court.

The appellants, in their oral arguments and brief, make the following points:

1. That the statute under which the proceedings for annexation are had is against private right, and in derogation of the common law, and therefore should be strictly construed; that, conceding the constitutionality of the act, the proceedings can not be maintained, unless every requisite of the statute is followed.

We do not regard the statute as one against private right, nor in derogation of the common law. The mere act of annexation, and that is the only question before us, does not take away the property from the owner, nor affect his private right. It may bring it into another jurisdiction, and affect the civil relation of the owner towards the public, but, as between individual and individual, his rights will remain equal with others under the same circumstances. And the power to change the boundaries of counties, townships or municipalities is a common law principle as old as the time of William the Norman, or even Alfred the Great; but in America it is generally regulated by statute. We hold, however, that the statute should be closely construed, because it is a delegation of legislative power, but not impracticably

Stilz et al. v. The City of Indianapolis et al.

strict. It is not enacted for the private benefit of the corporations which may be called upon to exercise its power, but for the public good; it must therefore be so construed, within proper safeguards, as to reach the end and design of the legislative intention in enacting it.

2. The appellants insist, that the petition for the annexation is not sufficient, because it was not signed by the mayor and each member of the common council; that the city charter provides, that, "The mayor and common councilmen of said city shall constitute the common council."

Unless when otherwise provided, such a majority of the councilmen as can bind the whole will be held to be the common council. By the first clause of section 85, *supra*, when the limits of any city may be extended over any lands or contiguous territory, by the consent of the owner, it requires a two-thirds vote of the council; and, perhaps, in the latter clause of the same section, under which these proceedings are sought to be maintained, it might require the same number to sign the petition, but we need not, and therefore do not, decide these questions, because more than two-thirds of the councilmen in this case signed the petition; but it is very clear that the act nowhere requires the petition to be signed by the common council unanimously. We therefore think that the petition in that respect is sufficient.

3. It is contended, that, by section 85, the petition must contain "an accurate description by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to the city."

We think the description of the lands is sufficient. It corresponds with the congressional surveys, upon which more than half the land titles in the United States rest, subject to certain exceptions which are capable of being accurately ascertained. To hold that "metes and bounds" must necessarily mean a tracing of the boundary lines, would not make the description of the land any more cer-

tain, and would be so strict a construction of the statute, that it would render action under it embarrassing and quite impracticable.

4. The appellants urge still further objections to the petition, as follows: "Again, the statute requires that the petition shall be accompanied with a plat of the lands proposed to be annexed."

In this case the plat was not filed till after the petition was presented to the board, but the description of the land was contained in the petition. The statute does not strictly require that the plat should be filed at the same time with the petition, but that the petition shall be "accompanied with a plat of the lands or territory proposed or desired to be annexed to such city." We can not approve so strict a construction of these words as that contended for by the appellants. In our opinion the board of commissioners acted properly in allowing the city to file the plat after the petition had been presented. *Hedrick v. Hedrick, ante, p. 78.*

5. It is also insisted, that, "Another requirement of the statute was not complied with. The petition was not filed with the Auditor of Marion county, nor in his office, thirty days before the session of the board at which it was presented and the annexation made."

The statute says that the council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory intended to be annexed; but we do not find any thing in it requiring that the petition itself shall be filed in the Auditor's office with the notice. Indeed, the words "intended petition" would seem to indicate a contrary construction. The notice appears to us to be sufficient.

6th. The appellants further urge, that,

"There is another fatal defect in these proceedings. There has been no survey of the premises as a basis of the order of annexation. This, by section 86, is contemplated as an essential preliminary step. By this section,

Stilz et al. v. The City of Indianapolis et al.

it is provided that the order must be entered 'specifying the territory annexed, with the boundaries of the same, according to the survey.' Now, the importance of a survey is at once seen, when the record of final action must be made upon it. The object of this survey must be to test and verify the description and plat filed by the common council; to put the board of commissioners in full possession of the situation, boundaries and condition of the territory proposed to be annexed. When the propriety of annexation is found, then the limits must be fixed by a survey. Not till then can the final order be made. No survey was made or pretended, for on the very same day that the propriety of the annexation was determined, the whole matter was at once consummated."

The petition contains a descriptive survey, and the plat an actual survey. From these there would be no practical difficulty in ascertaining the exact locality of the grounds; and what can be made certain is certain. Whether the survey was made expressly for the purposes of this annexation, or was adopted from some established survey, does not appear; but it is practically a survey, within the fair meaning of the act.

7th. The appellants seem to place the authority to annex territory to a city upon the same ground as the power to take property by the right of eminent domain. The following is their argument:

"But, should the court hold that the proceedings have the effect to accomplish the annexation under ordinary circumstances, we take the position, that where, as in this instance, it appears that the land is farming and gardening lands, only, used for such purposes, and fit for nothing else at present; where the land is not laid off into lots, and where there is no necessity for their use, as a part of the city, for any purpose whatever, either for convenience, health, peace or the public welfare, and when the sole purpose of annexation is to subject the land to taxation; such an act is a violation of the constitution—is the taking

Stilz et al. v. The City of Indianapolis et al.

of private property for public use, without compensation. It is an arbitrary, unjust, oppressive and wanton exercise of power, to which the citizen should not submit, and which the courts should peremptorily enjoin. It is a despotic exercise of power, no less odious because performed by a board of commissioners instead of an individual. * * * The right to property is a vested one. The power to tax it belongs alone to the legislative arm of the Government. This power, while it is, when properly exercised, to be unreluctantly obeyed, yet, operating as it does upon this vested right, it should be watched with jealous care, and, if illegal, mere submission on the part of the citizen to this one arm of the tremendous power of eminent domain should not, except in extreme cases, be construed into a recognition of the right to the extent of estopping him from subsequently denying it."

We do not perceive any analogy between the two powers. By the right of eminent domain, the State takes specific property, from the owner, for a public and specific purpose. It affects no other property than that taken, no other individual but the owner, and can have but the one purpose. In the case before us no property is taken from the owner, by annexation, no private right of the owner is affected; the act simply changes the property and its owner, in their civil relation to certain public authority. This power the State has the right to exercise, directly or indirectly, within constitutional limits, at any time.

8th. The appellants combat the power of the city to tax lands of the character in controversy, after the annexation has been accomplished.

There is no such a question before us. True, the complaint avers, that to derive revenue by taxation from the territory to be annexed, is one of the purposes the city has in view; but no tax has been levied. Should the city levy an illegal tax on the property, the law, we doubt not, will protect the rights of the owner. Or, if the city should desire to open streets and alleys through the territory an-

Stilz et al. v. The City of Indianapolis et al.

nexed, it will, doubtless, have to do it according to law. The owner and his rights will be protected in the same manner as all other owners and property, who stand in the same relation to civil authority, are protected. Relief by injunction can be granted only when the injury apprehended is impending and immediate. It will not be granted to restrain the collection of taxes before they are assessed.

9th. The constitutionality of the act under which the territory in this case is sought to be annexed is rather mentioned than debated. Boards of commissioners have been long since authorized by the legislature to form new counties, change the boundaries of old ones, and reconstruct township lines, and their constitutional power to do so has never, we believe, been seriously questioned. We do not see any distinction in principle between such power and the power delegated by the legislature to a board of commissioners, on petition of a common council of a city, to annex territory to the municipality. Besides, statutes authorizing the annexation of territory to towns, similar to that now under consideration, have been in force, and proceedings under them upheld by this court, in many instances heretofore. *Green v. Cheek*, 5 Ind. 105; *The Mayor, etc., of Jeffersonville v. Weems*, 5 Ind. 547; *The City of Aurora v. West*, 9 Ind. 74; *Allen v. Hostetter*, 16 Ind. 15; *Woodfill v. The Town of Greensburgh*, 18 Ind. 203; *Edmunds v. Gookins*, 20 Ind. 477; *The City of Evansville v. Page*, 23 Ind. 525; *Edmunds v. Gookins*, 24 Ind. 169; *Longworth's Ex'rs v. The Common Council of the City of Evansville*, 32 Ind. 322; *Trustees of the Town of Princeton v. Manck*, 35 Ind. 51; *Church v. The Town of Knightstown*, 35 Ind. 177; *City of Indianapolis v. Sturm*, 39 Ind. 159.

We have thus examined the case, and considered the argument of counsel, but find no error in the record.

The judgment is affirmed, with costs.

Duncan v. Cravens et al.

DUNCAN v. CRAVENS ET AL.

55	525
137	80
55	525
140	605

STATUTE OF LIMITATIONS.—Contribution.—Fraudulent Conveyance.—Action to Set Aside.—Judgment against Sureties on Official Bond.—A joint judgment having been rendered against two sureties of an insolvent principal upon an official bond, and a purchaser from one of them, of realty subject to the lien of such judgment, having paid it off to discharge such lien, he brought an action against a purchaser of other realty, prior to the rendition of such judgment, from such other surety, to set aside such conveyance and subject such realty to contribution to such judgment, alleging such conveyance to have been made, and received, with intent to defraud such other surety's creditors. The defendant having pleaded the statute of limitations of six years,—

Held, on demurrer, that such answer is sufficient.

PRACTICE.—Amendment.—Discretion of Court.—The court, in its discretion, may allow the filing of additional pleadings, if no objection be made, even after issues have been perfected at a prior term and the cause been continued to another, and even after heavy costs have accrued, which would not have accrued had such pleadings been filed at the prior term.

SAME.—Payment of Costs.—Where such additional pleadings have been so filed, the court has no power to compel the party filing them to pay such costs, so accrued, before requiring issue to be joined on such pleadings.

From the Ripley Circuit Court.

G. Durbin, for appellant.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

WORDEN, J.—Action by the appellant, against the appellees. Judgment for the defendants.

The case made by the complaint is briefly this:

One Vandever was sheriff of Ripley county, and John Mullen, Walter Bogot and David H. Kitts were sureties on his bond.

In November, 1867, Frank Dennison recovered a judgment in the court of common pleas of said county, against the said sheriff and his said sureties on his bond, for two hundred dollars and costs, which judgment was a lien on certain real estate, previously transferred by Kitts, to Cravens, as hereinafter stated. The judgment was also a lien on certain property of Mullen, which has been transferred

Duncan v. Cravens et al.

to the plaintiff, and the plaintiff has paid the judgment in order to release the property from the lien of the judgment. Bogot was insolvent at the time of the rendition of the judgment, and Kitts has since died, leaving no estate whatever to administer upon.

It is alleged, that at the time of executing the bond, Kitts was the owner of certain real estate described, which he afterwards, and before the rendition of the judgment, for the purpose of defrauding his creditors, conveyed to Cravens, who had notice of the fraud; and that Cravens has conveyed the property to William D. Willson, for the consideration of two thousand five hundred dollars, of which amount there remains unpaid the sum of one thousand six hundred dollars.

The complaint, as we understand it, seeks contribution from the property of Kitts, thus transferred by him to Cravens, and a judgment against the latter and Wilson, and that the conveyance be set aside as fraudulent.

At the September term of the court, 1874, the defendants answered in three paragraphs, and the plaintiff moved to strike out two of them, which motion was sustained at that term.

At the November term, 1874, the cause was continued by agreement.

On the second day of the February term, 1875, the parties appeared, and leave was granted to the defendants to file an additional paragraph of answer, which paragraph, on the fourth day, was filed as the fourth paragraph of answer, setting up the statute of limitations of six years.

The plaintiff moved to reject the fourth paragraph, but the motion was overruled, and he excepted.

He then demurred to the paragraph for want of facts, but the demurrer was overruled, and he again excepted. The plaintiff declined to reply, and thereupon judgment was rendered for the defendants.

Error is assigned upon these rulings. The grounds assigned for the motion to reject the paragraph were, that

Duncan v. Cravens et al.

at the September term, 1874, when the cause was put at issue, all the facts pleaded in the paragraph were within the knowledge of the defendants; and that the cause had stood ready for trial at one term previous to the term at which leave was asked to file the paragraph, and that costs had accrued at that term, which were shown to amount to over one hundred dollars, which would not have been incurred if the paragraph had been filed at the term at which the cause was put at issue. And the plaintiff asked that the defendants be required to pay those costs, before the plaintiff should be required to take issue upon the paragraph.

Section 99 of the code (2 R. S. 1876, p. 82) provides, that “* * * The court may also in its discretion allow a party to file his pleadings after the time limited therefor;” and we can not say that there was any abuse of discretion in this case, in not striking out the paragraph, especially as leave was given, without objection, to file an additional paragraph. The court, in our opinion, was clearly right in not requiring the defendants to pay the costs of the previous term before the plaintiff should be required to reply to the paragraph. If the plaintiff had asked for a judgment against the defendants, for the costs incurred by him at the previous term, a different question would have been presented.

The demurrer to the paragraph was, in our opinion, correctly overruled.

The action was a direct proceeding to set aside the conveyance from Kitts to Cravens, on the ground of fraud, so as to enable the plaintiff to collect his assumed debt, and clearly within the terms of the statute fixing a limit of six years to actions “For relief against frauds.” 2 R. S. 1876, p. 121, sec. 210. *Musselman v. Kent*, 33 Ind. 452.

There is no error in the record.

The judgment below is affirmed, with costs.

Noble v. McGinnis et al.

NOBLE v. MCGINNIS ET AL.

DECEDENTS' ESTATES.—Circuit Court.—Jurisdiction.—Waste.—Action Against Estate and Another.—How Commenced.—Judgment.—Mortgage.—Claim.—How Filed.—Notice.—Summons.—Practice.—Pleading.—Will.—A testator, dying seized in fee of lands, devised them to his widow, during her widowhood, with remainder in fee, in common, to his children, part of whom conveyed their portions of such remainder to a purchaser; such widow having died, such purchaser commenced a joint action in the circuit court, against the administrator of her estate and the guardian of another, by filing a complaint upon the probate appearance docket, and issuing a summons thereon to such guardian, alleging in his complaint, that, after he had received such conveyance, such widow had committed waste upon the inheritance, by cutting and selling timber growing thereon, with the proceeds of which she had purchased a tract of land and caused the same to be conveyed to such ward, and then died, leaving an estate insufficient to pay him his damages, judgment for which he demanded against such administrator, and also that such ward's said land be subjected to the payment of any deficiency which could not be realized from such estate.

Held, that the circuit court has now the same probate jurisdiction as formerly belonged to the common pleas court, but that it is entirely independent of its jurisdiction in ordinary civil actions.

Held, also, that a simple claim against a decedent's estate must be filed, and entered upon the appearance docket by the clerk.

Held, also, that judgment or mortgage liens upon the estate or property of a decedent can not be filed nor adjudicated as are simple claims.

Held, also, that the action in this case, being a joint one against such administrator and guardian, could not be commenced by filing a complaint upon the appearance docket, but ought to have been commenced as an ordinary civil action.

Held, also, that a summons upon a simple claim against a decedent's estate is not contemplated by the statute, the filing and entry of such claim being sufficient notice to the administrator.

Held, also, that the summons in this cause, to such guardian, ought not to have been issued, and the service thereof gave such court no jurisdiction over him; and, therefore,

Held, also, that all parts of such complaint, as to such guardian or his ward, were properly stricken out, and the action as to him dismissed, on motion.

Held, also, that such complaint, thus eliminated, constitutes a sufficient claim against such estate, and is within the probate jurisdiction of such court.

Held, also, that the will of such testator, though made part of such complaint, is not the basis of the action for waste, and can neither control nor aid any of the averments of such complaint.

55	528
147	618

55	528
158	200

Noble v. McGinnis et al.

Held, also, that, by the averments of the complaint, such widow had a life-estate, only, in such lands.

From the Marion Circuit Court.

C. W. Smith, R. O. Hawkins and C. H. Remy, for appellant.

G. W. Spahr, H. Dailey and W. N. Pickerill, for appellees.

NIBLACK, J.—This was a proceeding in the court below, by the appellant, against George F. McGinnis, administrator of the estate of Martha Ellis, deceased, and Reuben Burnett, guardian of Hiram Ellis, a person of unsound mind.

The complaint represented that in February, 1846, Nelson R. Ellis, late of Marion county, died testate, leaving the said Martha Ellis, as his widow, and nine children, naming each of them, surviving him. That at the time of his death, the said Nelson R. Ellis was the owner of several tracts of land in said county, containing in all two hundred and forty acres, and that by his last will and testament said lands were devised to the said Martha Ellis, during her widowhood. That upon her death each of his said children was to become entitled to one-ninth part of said lands.

That on the 20th day of June, 1860, he, the appellant, became the owner, by a good and sufficient deed of conveyance, of three undivided ninth parts of said lands, being the shares of three of the said children of the decedent. That on the 29th day of November, 1861, he also became the owner, by a proper deed of conveyance, of the share of one of the other children of the decedent, being another undivided ninth part of said lands. That on the 13th day of January, 1865, he became, by a sufficient deed of conveyance, also, the owner of one other undivided ninth part of said lands, being the share of still another one of the said decedent's children, and making in all five undivided ninth parts of the lands

Noble v. McGinnis *et al.*

aforesaid. That at the time the appellant purchased the several interests in said lands, as aforesaid, there was a large amount of valuable timber growing and standing upon said lands; that the said Martha Ellis wrongfully and wastefully permitted, caused and procured said timber to be cut down, hauled away and sold, for her own gain and emolument. That by reason of the cutting down and removal of said timber, the inheritance in said lands was greatly wasted and lessened, to wit, in the sum of five thousand dollars, and to the damage of the appellant two thousand five hundred dollars.

That the said Martha died sometime in the fall of 1873, and that soon thereafter, to wit, on the 11th day of November, 1873, the said George F. McGinnis was appointed administrator of her estate. That the said Martha Ellis, during her lifetime, with money realized from the sale of said timber, so wrongfully and wastefully caused to be cut down upon and removed from said lands, purchased from Virginia Ellis, another one of the children of the said Nelson R. Ellis, her share and interest in said lands, and caused the same to be conveyed to Hiram Ellis, a person of unsound mind, who paid no part of the purchase-money therefor. That there was not a sufficiency of assets, belonging to the estate of the said Martha Ellis, to pay the appellant's said claim, without subjecting the said Hiram Ellis's interest in said lands to sale for the payment thereof, and that the said Martha Ellis, at the time of her death, was possessed of and left no real estate. That the said Reuben Burnett was the duly appointed guardian of the said Hiram Ellis.

The complaint also represented, that since the death of the said Martha Ellis, partition of the lands devised to her by the said Nelson R. Ellis, as aforesaid, has been made between the owners thereof, and that a certain portion of said lands, describing it, has been set off to the said Hiram Ellis.

That before the filing of this claim against the estate

Noble v. McGinnis *et al.*

of the said Martha Ellis, the appellant demanded of the said Reuben Burnett, that he should hold the portion of said lands, so set apart to the said Hiram Ellis, subject to the payment of said claim, which he, said Burnett, refused to do. Wherefore the appellant prayed judgment against the estate of said Martha Ellis for the sum of five thousand dollars. Also, that the portion of said lands set off to the said Hiram Ellis, or so much thereof as might be necessary, should be decreed to be sold, to pay such judgment, after exhausting the personal estate of the said Martha Ellis.

A copy of the will of the said Nelson R. Ellis was filed with the complaint, as an exhibit in the cause, and the complaint was verified by the affidavit of the appellant. The appellee Reuben Burnett, as the guardian of the said Hiram Ellis, entered a special appearance to the action, and moved the court to dismiss the cause as to him, for the alleged reason, that, as shown by the complaint, the court below, as a probate court, had no jurisdiction of the cause of action against him. The court sustained the motion, to which the appellant excepted.

The appellee George F. McGinnis, as the administrator of the estate of the said Martha Ellis, then moved the court to strike out of the complaint all that related to the alleged cause of action against the said Reuben Burnett, guardian as aforesaid, including so much of the prayer of said complaint as demanded relief against him, said Burnett, as such guardian. That motion was also sustained by the court, to which the appellant also excepted.

To the complaint, as thus eliminated, the said McGinnis demurred, assigning as grounds of objection—

1st. That the court, as a probate court, had no jurisdiction of the subject of the action ; and,

2d. That the complaint did not state facts sufficient to constitute a claim against the estate of the said Martha Ellis, deceased.

Noble v. McGinnis et al.

The court sustained the demurrer, to which appellant also excepted, and there was judgment on the demurrer, against the appellant.

The sustaining of the motion to dismiss the action as to the said Reuben Burnett, guardian as aforesaid, the sustaining of the motion to strike out so much of the complaint as was intended as a cause of action against him, as such guardian, and the sustaining of the demurrer of the said McGinnis to the complaint, are severally assigned for error, in this court.

The circuit courts have now conferred upon them a probate jurisdiction, which is separate and distinct from their general jurisdiction in civil causes; and their methods of proceeding, in the exercise of their probate jurisdiction, are equally separate and distinct from those prescribed by the code of civil procedure in ordinary civil actions. All matters touching decedents' estates, wills, administrators, executors, guardians and heirs, and all business transacted in relation thereto, in said courts, are required to be kept separate, in proper books prepared for that purpose, in the same manner as when the courts of common pleas had the exclusive original jurisdiction of the probate business of the State, and such probate jurisdiction, since it has been transferred to the circuit courts, is still as much a separate and independent jurisdiction as when it was exercised by the courts of common pleas. *Alexander v. Alexander*, 48 Ind. 559.

A summary method is provided for filing and adjudicating simple claims against a decedent's estate. The entry of such claims, when filed, on the appearance docket of the proper court, by the clerk, is made sufficient notice of the filing of such claims, without the issuance of a summons, or other notification, as in ordinary adversary proceedings. See 2 R. S. 1876, pp. 512, 515, sections 62, 65.

Judgments, which are liens upon the decedent's real estate, and mortgages of his real or personal estate, executed

in his lifetime, can not be filed in that way, and where any controversies arise as to such liens and mortgages, they must necessarily be adjudicated by other less summary methods.

The complaint in the case before us constitutes, primarily, a claim against the estate of the said Martha Ellis, deceased, and, as such, seems to have been filed against her estate under section 62, above referred to. It includes, also, some additional allegations and averments, which are intended as a cause of action against the said Reuben Burnett, as guardian of the said Hiram Ellis, on which it appears a summons was issued to the said Burnett, requiring him to appear and answer to said complaint.

It was clearly competent for the appellant to join the said McGinnis, as administrator, and the said Bennett, as guardian, in the same action, if the cause of action was a joint one, but not under section 62, as a simple claim against the estate of the decedent. It must be by ordinary civil proceedings. *Braxton v. The State, ex rel., etc.*, 25 Ind. 82; *Martin v. Asher's Adm'r*, 25 Ind. 237; *Smith v. Denman*, 48 Ind. 65; *Stanford v. Stanford*, 42 Ind. 485.

In the case of *Hyatt v. Mavity*, 34 Ind. 415, it was held, that where a complaint shows, on its face, that the action is to recover a claim against the estate of a decedent, and the proceeding has been commenced, not by filing a claim, but as an ordinary action, the suit should be dismissed on motion.

The statement of the claim filed against a decedent's estate, under section 62, is much less formal than a complaint in an ordinary action. *Crabb v. Atwood*, 10 Ind. 322; *Pulley v. Perfect*, 30 Ind. 379; *Smith v. Denman*, *supra*.

We do not think it was contemplated that a summons should be issued on a claim filed under said section 62, or that such a claim should be combined with another, involving ordinary adversary proceedings between other

parties. We are consequently of the opinion, that the summons in the case in hearing was improvidently issued for the said Burnett, and that the court did not err in dismissing the action as to him.

For the same reason, we think the court did not err in striking out all of the complaint which was intended as a cause of action against the said Burnett, as the guardian of the said Hiram Ellis.

In the discussion of the sufficiency of the complaint, counsel on both sides mainly devote themselves to respective constructions of the will of the said Nelson R. Ellis. A copy of that will was filed with the complaint, and made an exhibit in the cause, but, as the will was not the foundation of the action, the copy thus filed is not a part of the complaint. It can not therefore be made to control any averments in the complaint, or to supply any omissions in its averments. Hence, the demurrer to the complaint does not require us to give any construction to that will here. See *Wilson v. Vance*, *post*, p. 584. From the facts stated in the complaint, we would infer that the said Martha Ellis had only a life-estate in the lands alleged to have been devised to her by her husband. As thus construed, the complaint constituted, on its face, a valid claim against the estate of the said Martha Ellis, and ought, as we think, to have been held sufficient on demurrer.

The judgment sustaining the demurrer to the complaint is therefore reversed, at the costs of the estate of the said Martha Ellis. The other proceedings in the cause are affirmed, at the costs of the appellant, and the cause is remanded, with instructions to the court below to overrule the demurrer.

HARVEY v. OSBORN.

55 535
187 616

FORMER ADJUDICATION. — *Estoppel.* — *Suretyship.* — *Trial of.* — *Pleading.* —

Practice. — Proceeding to determine the question of suretyship, as between A. and B., the defendants in an action upon a promissory note, wherein A. had appeared and answered and B. had made default. To a complaint by A. alleging himself to be the surety, only, and B. to be the principal, B. answered, alleging as matter of estoppel, that in the answer by A., in the original action, he had alleged such suretyship on such note, and had asked to be discharged because of a failure of the plaintiff to sue such note upon being notified in writing, by A., so to do, and because of an alleged extension of the time of such note upon a consideration paid by B., as principal, to the plaintiff, and that upon the trial of such original action a finding had been rendered by the court, for the plaintiff and against A., upon such issues.

Held, on demurrer, that such answer by B. is insufficient.

Held, also, that, to such answer by A., to the original complaint, B. could not have demurred or pleaded, and therefore the matters therein alleged were not *res adjudicata*, as between A. and B.

SAME. — *Evidence.* — Where, on the trial of the question of suretyship, as between A. and B., the makers of a promissory note upon which they have been sued, upon pleadings by each, alleging that he was the surety and the other the principal, and the evidence established that such note had been given for a loan of money by the payee, and that when such money was procured, A., in the presence of B. and the payee, took such money and carried it away, it was competent for A., in order to rebut any inference, arising from such evidence, that he was the principal, to introduce evidence to show that B. was, at the time of such loan, indebted to him, as a circumstance tending to support his own testimony that B. had procured such loan to pay such indebtedness to A.

SAME. — *Leading Question.* — A question, in the nature of a direction to the witness to whom it is put, to state what, if any, knowledge he has concerning a material matter in controversy, to which his attention is, by the same question, called, is not leading.

SAME. — A question which suggests to the witness, and leads him to make, the answer desired, is leading.

SAME. — *Practice.* — *New Trial.* — Where alleged error of the court, in the admission or exclusion of evidence offered, is relied upon as ground for a new trial, such evidence must be clearly specified in the written motion therefor.

SAME. — *Instructions to Jury.* — Where the law embodied in instructions, asked to be given to the jury trying a cause, is, in part, contained in instructions given, and, in part, not applicable to the evidence given in the cause, it is not error to refuse them.

DEPOSITION. — *Motion to Suppress.* — *Cause.* — *Notice.* — The fact that the certifi-

Harvey v. Osborn.

cate to a deposition shows it to have been taken at the "city," instead of at the "town," of A., as specified in the notice of such taking, is no cause for suppressing such deposition.

SAME.—Presumption.—Practice.—In the absence of an affidavit showing them to be different places, it will be presumed that the office of the clerk of the "county court," etc., at which the certificate to a deposition shows it to have been taken, is the same place as the office of the clerk of the "county," etc., where the notice specified it would be taken.

SAME.—Court of Record.—A court having a clerk and a seal is "a court of record."

SAME.—Official Character.—Waiver of Proof.—Clerk of Court of Record.—If proof of the official character of an officer before whom a deposition is to be taken be waived, his certificate thereto, under the seal and as the clerk of a court, and such waiver, are sufficient evidence that such deposition was taken by the "clerk of a court of record."

SAME.—Clerk of Court.—How He Must Certify.—Where a deposition is taken before the "clerk of a court of record" he must certify to the same under the seal of such court.

SAME.—Officer.—Notice.—The notice of the taking of a deposition need not specify before what particular officer it will be taken; but if it does so specify, the fact that it was taken before a different officer will not render the deposition invalid.

From the Franklin Circuit Court.

T. B. Adams, F. Berry, H. Berry and W. H. Bracken,
for appellant.

C. C. Binkley, H. W. Harrington, W. H. Jones and F. S. Swift, for appellee.

Howk, J.—At the March term, 1873, of the court of common pleas of Franklin county, Indiana, one John Roberts had an action then and there pending, against both the appellant and the appellee in this cause, for the recovery of the amount due on a promissory note, of which the following is a copy, to wit:

"\$339.60. BROOKVILLE, March 1st, 1868.

"One year after date, we promise to pay to John Roberts, or order, three hundred and thirty-nine dollars and sixty cents, value received, waiving the benefit of valuation and appraisement laws.

(Signed)

"WILLIAM OSBORN.

"SQUIRE HARVEY."

Harvey v. Osborn.

In that action, the appellant, Harvey, made default; but the appellee, Osborn, appeared and filed his answer in four paragraphs, to the complaint of said John Roberts, as follows:

First. A general denial;

Second. That as to thirty-nine dollars and sixty cents of the note, there was no consideration, and that the rest of the note was paid before the suit was commenced;

Third. That he signed the note as the surety, only, of said Squire Harvey, and that after the maturity of said note, on November 13th, 1872, by written notice to said John Roberts, a copy of which was filed with and made part of said answer, he required said Roberts to forthwith institute suit on said note; and that said Roberts did not, within a reasonable length of time, bring his action on said note and prosecute the same to judgment and execution. Wherefore he said that he, Osborn, was discharged from all liability on said note; and,

Fourth. That he admitted the execution of the note sued on, but he said that it was given for the sole debt of said Squire Harvey, and he, Osborn, was said Harvey's surety, only, which said John Roberts well knew; that after the maturity of said note, and at the time that said Roberts knew that he, said Osborn, was only a surety on said note, said Roberts agreed with said Harvey, in consideration of the payment of interest at a rate exceeding that provided for in said note, to extend the time of payment thereof for the space of one year, and did so extend said time of payment,—all of which was done without the knowledge or consent of said Osborn.

The said John Roberts replied to the separate answer of said William Osborn, by a general denial of each and every allegation contained in each paragraph of said answer. Upon the issues thus joined, there was a trial by said court of common pleas, without a jury, and a finding made in favor of said John Roberts, that the material allegations of his complaint were proven and true; and

Harvey v. Osborn.

upon this finding, and the default of said Harvey, a judgment was rendered by said court, in favor of said Roberts, against both the appellant and appellee, for the amount due on said note, and costs of suit.

It appears from the record, that the appellee, William Osborn, at the time of the filing of his said answers to the complaint of said John Roberts, also filed in said court of common pleas, and in said cause, what was termed a cross-complaint, but was, in fact, a complaint, under the provisions of the 674th section of the practice act. This section reads as follows:

“Sec. 674. When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined, upon the issue made by the parties, at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff.” 2 R. S. 1876, p. 277.

The complaint of the appellee, William Osborn, under this section of the code, alleged, in substance, that he admitted the execution of the note in suit, but that it was given for money borrowed by the appellant, Squire Harvey, from said John Roberts, for the use and benefit of the appellant; and the appellee averred, that he signed said note as surety for the appellant, who was the principal therein, and the appellee was surety, only; and the appellee asked, that the appellant's property be first exhausted, before execution should be levied on appellee's property.

The question of suretyship, presented by this complaint, was not tried at the March term, 1878, of said court of common pleas; and before the next term, that court was abolished, and this proceeding was transferred, by operation of law, into the court below.

At the April term, 1878, of the court below, the parties

Harvey v. Osborn.

all appeared, and the appellant filed his separate answer to appellee's complaint, and also his cross-complaint.

The first paragraph of appellant's answer was a general denial of the allegations of appellee's complaint.

The second paragraph, termed a cross-complaint, was, in fact, a complaint by the appellant, under the said 674th section of the practice act, in which the appellant alleged, in substance, that the note in suit was executed by the appellee, as principal, and by the appellant, as surety for the appellee, and that, in truth and in fact, the appellee was the principal in, and derived the sole benefit from, the note sued on; and the appellant asked that the appellee's property might be exhausted, before any execution, issued on said judgment, should be levied on appellant's property, etc.

In the third paragraph of his answer, the appellant alleged, in substance, that he executed the note mentioned in the appellee's complaint; that afterwards, to wit, on the 11th day of February, 1873, the said John Roberts brought suit on said note, against the appellee and the appellant, in the Franklin common pleas court; that the appellee entered his appearance and filed his answer to the complaint of said John Roberts, pleading as a defence to said action, that said note had been paid before the commencement of suit; that he, the appellee, executed the said note as the surety of the appellant, who was principal therein, and that appellee was the surety, only, of the appellant, and that it was the appellant's debt,—to which the said Roberts replied by a general denial; that at the March term, 1873, of said common pleas court, said cause was submitted to said court, for trial on the issues joined, and there was a finding and judgment that the appellee and appellant were both principals on said note, and a judgment rendered by said court in favor of said Roberts, against both the appellee and the appellant, for the amount due on said note; and a copy of said proceedings and judgment was filed with and made part of said

Harvey v. Osborn.

answer. And the appellant averred, that the appellee was forever estopped, by said proceedings and judgment, from maintaining his said action against the appellant. And appellant demanded judgment, etc.

The appellee replied to the appellant's second paragraph of answer or complaint, by a general denial of the matters alleged therein.

And the appellee demurred to the third paragraph of appellant's answer, for the want of sufficient facts therein to constitute a defence to appellee's complaint, which demurrer was sustained by the court below, and to this decision the appellant excepted.

And the action being at issue, as between the appellee and the appellant, was tried by a jury, in the court below, which trial resulted in a verdict for the appellee, that he executed the note sued on as the surety of the appellant. Upon written causes filed, the appellant moved the court below for a new trial, which motion was overruled, and appellant excepted. And a judgment was then rendered upon the verdict, as provided for in such cases by section 675 of the practice act. 2 R. S. 1876, p. 279.

In this court, the appellant has assigned errors to the number of fifteen; but of these alleged errors only two are available to the appellant, as here presented, for any purpose. These two available errors are the following:

1st. Error of the court below, in sustaining appellee's demurrer to the third paragraph of appellant's answer; and,

2d. Error of the court below, in overruling the appellant's motion for a new trial.

In our opinion, the facts alleged by the appellant, in the third paragraph of his answer, were clearly insufficient to estop the appellee from alleging and proving, that, as between him and the appellant, he was the appellant's surety on the note in suit, or from demanding all the relief afforded in case of suretyship, by said 675th section of the code of civil practice, *supra*. The answers filed by the appellee, to the complaint of John Roberts, and

Harvey v. Osborn.

the reply of the latter in denial of those answers, and the finding and judgment of the court below on those issues, did not and could not determine finally the controversy between the appellant and the appellee, as to their relative liabilities on the note sued on ; for there was not, and could not be under our system of pleading, any issue joined by the appellant on the said answers of the appellee to the complaint of John Roberts. Where two parties are sued in the same action, and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his codefendant, such codefendant can not, under our code of practice, demur or reply to, or join issue in any manner upon such separate answer. And in such a case, the finding and judgment of the court, on an issue joined on such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendants, as between themselves. In the case at bar, it is very clear, we think, that the appellant was not and could not be estopped or concluded by the finding and judgment of the court below, on the issues joined between the appellee and John Roberts, as to any matter or existing right between the appellant and the appellee. And it is equally clear, in our opinion, that however binding and conclusive the judgment was upon the appellee, as between him and the plaintiff, John Roberts, as to any matters in issue between them, yet that judgment would not bar or estop the appellee from litigating the same matters, or a part of them, with any one who was not a party to the issues between himself and the plaintiff, John Roberts. We hold, therefore, that the court below did not err in sustaining the appellee's demurrer to the third paragraph of the appellant's answer.

The second alleged error, which the appellant has properly assigned on the record of this cause, is the decision of the court below in overruling the appellant's motion for a new trial.

Harvey v. Osborn.

In his motion for a new trial, the appellant assigned fifteen different alleged causes for such new trial; and each one of these several causes the appellant has elaborately argued in his brief of this action, in this court. We will consider and decide, as briefly as we can, the questions presented by these several alleged causes for a new trial, in their enumerated order.

1. The first alleged cause for a new trial was, that the court had erred in overruling the appellant's motion to suppress the depositions of George R. Osborn and Henry Coen, taken by the appellee and read in evidence on the trial, for the reasons specified in said motion. Five reasons were assigned by the appellant for the suppression of these depositions. The first reason was, that the depositions were not taken at the town of Olney, but were taken at the city of Olney, Richland county, Illinois, when the notice was for the taking of the depositions at the town of Olney. A town is not always a city, but a city is always a town. Webster's definition of a city is, that it is a large town, an incorporated town. There is nothing in this first reason.

The second reason was, that the depositions were not taken at the office of the clerk of the county of Richland, in the town of Olney and State of Illinois, as stated in the notice for the taking thereof, but were taken at the office of the clerk of the county court, in the city of Olney, in the county of Richland, and State of Illinois. In assigning this reason, the appellant evidently assumed that the place indicated by the latter description was another and different place from the one indicated by the description in the notice. It seems to us, however, that these two descriptions indicate one and the same place, and are only different modes of describing it. If these two descriptions indicated, in fact, two different places, the appellant should have shown that fact by his affidavit. In the absence of such an affidavit, we hold that the latter

Harvey v. Osborn.

description sufficiently showed that the depositions were taken at the place indicated in the notice.

The third reason was, that the depositions were not taken before an officer authorized by law to take the same. The 245th section of our code of civil practice provides, that "Depositions of witnesses, taken within or without the State, may be taken * * * * before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions." 2 R. S. 1876, p. 138. The depositions, in this case, appear to have been taken before William F. Shelby, clerk of the county court of Richland county, Illinois. In acknowledging service of the notice for the taking of the depositions, the appellant expressly waived "*dedimus* and certificate of official character of the officer before whom said depositions are taken." But it is objected, that it did not appear that the "county court" of Richland county, Illinois, was a "court of record." We think otherwise. Appellant's waiver of proof of the official character of the clerk of that court was equivalent to an admission that the court had a clerk, and the seal annexed to the clerk's certificate, attached to the depositions, showed that the court had a seal. A court having a clerk and a seal is a "court of record," within the meaning of our law. Therefore we hold, on this point, that the depositions were taken before the clerk of a court of record,—an officer authorized by the law of this State to take depositions, either within or without this State.

The fourth reason assigned in appellant's motion was, that the seal, attached to the certificate of the pretended officer before whom the same were taken, was not his seal, but the seal of the county court. Our answer to this is, that where depositions are taken before the clerk of a court of record, as such, the only proper seal for him to use, in his certificate to such depositions, is the seal of the court of record of which he is clerk.

Harvey v. Osborn.

And the fifth reason assigned in support of said motion was, that no notice was served upon, accepted or waived, for or by the appellant, to take said depositions, before the pretended officer before whom said depositions purport to have been taken. It is a sufficient answer to this to say, that the law does not require that a notice to take depositions should specify the officer, pretended or otherwise, before whom the depositions are taken. 2 R. S. 1876, p. 139, sec. 246. If the notice should specify the officer before whom the depositions are to be taken, which it does not in this case, the party would not thereby be precluded from taking his depositions before any officer authorized by law to take depositions. And if the notice complied with the requirements of the 246th section of the practice act, it would be sufficient to authorize the taking of the depositions before any officer authorized by law to take them, whether the notice names any officer, pretended or otherwise, or not.

In our opinion, therefore, the appellant's motion to suppress the depositions mentioned therein was correctly overruled by the court below.

2d. The second cause assigned by the appellant, in his motion for a new trial, was, that the court erred in overruling his motion to suppress questions third, fourth and fifth, and the answers thereto, in the deposition of George R. Osborn, taken and read in evidence by the appellee, on the trial. The third question referred to was as follows:

"State what you may know, if anything, of any indebtedness of Squire Harvey, one of the defendants, to William Osborn, the other of the defendants, named in this case, on or about the year 1867?"

Appellant's objection to this question was, that it was "leading and improper." Ordinarily, a "leading question" is one, that, by its terms, suggests to the witness the answer he is expected to make, and leads him to make such answer. This third question was certainly not a

Harvey v. Osborn.

leading question, and what the appellant meant by objecting to the question as "improper," he has failed to point out, either to the court below or to this court. The answer of the deponent to this third question was as follows:

"My brother, William Osborn, about that time, held a note of Squire Harvey for the sum of one hundred and fifty dollars; my brother, William, and myself were living together at the time, and I was in the habit of keeping his papers. Among the papers, I frequently saw a note for that sum, purporting to be drawn by Harvey to my brother William; learned from Harvey that the note was for money loaned to him by my brother William, to pay for a piece of land. The note, as near as I remember, was given in 1865."

Appellant's objection to this answer was, that it was "improper, incompetent and irrelevant."

In our opinion, this objection was not well taken. The appellant and the appellee each claimed to be the surety of the other, on the note in suit. Upon the face of the note, it was the joint note of both appellant and appellee. Each was trying to show that the other was the principal in the note, and he was simply a surety. Neither of them had much direct or positive testimony on the question. Each of them was ready to, and did, testify, positively and unequivocally, that he was merely a surety, while the other was the principal in said note. Each of them desired to fortify his position and claim in regard to the note, by such facts and circumstances as would corroborate and support him in his account of the transaction. Appellant expected to prove, that, while he and the appellee were both present when the money was raised from John Roberts on the note, yet the appellee had picked up the money, put it in his pocket, and went away. Appellee's mode of proving his side of the case was much

Harvey v. Osborn.

more lengthy and elaborate, but perhaps much more in accordance with the actual facts of this case.

The appellee claimed, that, before the date of the note in suit, the appellant, who had married appellee's sister, had become indebted to the appellee, for money loaned and otherwise; that some time before the date of the note sued on, the appellee had told the appellant, that he wanted to buy some shares in his father's estate, and in doing so he would need the money which the appellant owed him; that thereupon the appellant sought the payee of the note in suit, and arranged to borrow the money from the latter, to pay his indebtedness to the appellee; that appellant then went to appellee, and said that he could get the money from John Roberts, to pay his indebtedness to appellee, if the appellee would become his surety on a note to John Roberts for the money; that, accordingly, the appellee agreed to and did become the appellant's surety on the note in suit, and went with the appellant to John Roberts for the purpose of giving the note and getting the money; and that when John Roberts counted out the money, as it was well understood between the appellant and appellee that the money was to pay appellant's indebtedness to appellee, the latter took up, and went away with, the money.

It will be seen, from the foregoing version of the appellee's case, that one of the most important points, which the appellee was required to prove on the trial, was, that the appellant, at or before the date of the note in suit, owed the appellee about the amount of the note. The evidence of such indebtedness would not, of course, prove, that the appellee was appellant's surety on said note; but it would tend to support and corroborate the appellee's account of the transaction, and to rebut any presumption which might otherwise be drawn from the fact, that, when John Roberts counted out the money on the note in suit, the appellee took up and went away with the money. For these purposes, we think that evidence, tending to

Harvey v. Osborn.

prove the appellant's indebtedness to appellee, at or about the date of the note sued on, was clearly competent and admissible. We have stated this matter fully, because, without a knowledge of the case, as claimed by each of the parties, our rulings on the admission or exclusion of evidence would be unintelligible.

The fourth question referred to was as follows: "Do you know anything of the other moneyed transactions between these same parties; if so, state their nature, and the time, as near as you may remember?" Appellant's objection to this question was, that it was "leading and improper." But for reasons already given, the question was neither leading nor improper. This question could not possibly suggest to the witness any answer. The same objection was made to the answer to this question as to the answer to the third question; but for the reasons given in relation to the latter answer, appellant's objections to the answer to the fourth question were not well taken.

The fifth question referred to was as follows: "State what you may know, if anything, of the purchase of land, by your brother William, from Harvey or Harvey's wife,—share or shares of an estate,—when it was, and what land it was, and what, if any thing, did Harvey ever say to you on the subject?" This question was also objected to by appellant, as "leading and improper;" but we do not so regard the question. And the answer to this question was objected to on precisely the same grounds that the answer to the third question, to the same witness, was objected to; but for the reasons given in answer to the objections to the latter answer, we think the answer to the fifth question was properly sustained. So that our conclusion is, the court below committed no error in overruling appellant's motion to suppress the said parts of the said George R. Osborn's deposition.

3. The third alleged cause for a new trial, assigned by appellant, was, that the court erred in overruling appel-

Harvey v. Osborn.

lant's motion to suppress the third, fourth and fifth questions, and the answers thereto, in Henry Coen's deposition, taken and read by the appellee, on the trial, as evidence in his behalf. The third question referred to was this: "State what you may know, if any thing, about any indebtedness by Squire Harvey, one of the defendants in the cause, to William Osborn, other defendant?" Appellant's objection to this question was, that it was "leading and improper;" but we hold, that the question was not objectionable on either ground. And the answer to this question was also objected to as "improper, incompetent and irrelevant;" but the answer was a proper response to the question, and we think it was competent and relevant.

The fourth question referred to was this: "In speaking of a balance of an interest of his wife in the homestead, was reference had to a share purchased by William Osborn, of the wife of Harvey, as child and heir at law of James T. Osborn, or was it some other and different claim?" We do not think that this question was open to appellant's objection, that it was "leading and improper." The question naturally arose from the deponent's answer to the preceding question, and was a proper question. Nor do we think that the answer to this question was objectionable; it was merely explanatory of a previous answer of the same witness.

The fifth question was as follows: "State what you may know about the making of some barrel staves, by yourself and William Osborn; who got the staves, and who was to pay for them, and to whom was payment to be made; how many staves were there, and how much, per thousand, was to be given for them, and when it was?" There is certainly nothing in this question which would indicate to the deponent what answer he should make thereto; but the appellant objected that the question was "leading and improper." In our opinion the question was unobjectionable; and, for reasons heretofore given,

Harvey v. Osborn.

the answer to this question was proper, competent and relevant. And therefore we conclude, that the court below did not err in overruling the appellant's motion to suppress parts of Henry Coen's deposition.

The fourth and fifth causes for a new trial, assigned by appellant, may be considered together. The fourth cause was, that the court erred in permitting "illegal, improper, incompetent and irrelevant evidence," offered by appellee, to go to the jury, over appellant's objections. And the fifth cause was, that the court erred in excluding, and refusing to let go to the jury, "legal, proper, competent and relevant evidence," pertinent to the issues joined in this cause, offered by the appellant. • In neither of these alleged causes for a new trial is the evidence referred to, specified or pointed out, or made certain, in any manner. Each of these causes was too vague, indefinite and uncertain, to present any question for the consideration, either of the court below or of this court. It has been held, by this court, in numerous cases, that a motion for a new trial, for either one of the causes now being considered, must specify or point out the evidence so admitted or excluded. *The Ohio, etc., R. W. Co. v. Hemberger*, 43 Ind. 462; *Sherlock v. Alling*, 44 Ind. 184; *Meek v. Keene*, 47 Ind. 77.

The sixth, seventh, eighth and ninth causes for a new trial, assigned by the appellant, may be considered together. Of these, the first three relate to the instructions, eight in number, given to the jury by the court below, of its own motion; and the ninth cause relates to written instructions, to the number of ten, prepared by appellant's counsel, and which the appellant requested the court below to give to the jury, but the request was refused. We have very carefully examined and considered the instructions given by the court below, to the jury trying this cause, and, in our opinion, these instructions contain a full and fair statement of the law applicable to the facts of the case, as developed by the evidence on the trial. It

Harvey v. Osborn.

is observable, indeed, that while the appellant's counsel have criticised, at length, the verbiage and syntax of the instructions given, they have failed to point out a single objection to the law enunciated in those instructions.

Upon a thorough examination of the ten instructions, asked for by the appellant, and which the court below refused to give to the jury, we can not say that the court committed an error in its refusal to give any one of those instructions. It is not necessary that we should set out and examine the instructions, asked for and refused, in detail. It will suffice to say, that much of the law stated in those instructions was not applicable to the facts of this cause, as developed by the evidence before the jury; and that all of the law therein which was applicable to the facts of this case, was given to the jury by the court below, in its own instructions. Therefore, we think the instructions asked for by the appellant were properly refused.

The tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes for a new trial, assigned by the appellant, are only different modes of alleging the sixth statutory cause for a new trial, to wit:

"*Sixth.* That the verdict or decision is not sustained by sufficient evidence, or is contrary to law." 2 R. S. 1876, p. 181.

These several causes present but one and the same question, viz.: Was there, or not, a sufficiency of competent evidence before the jury trying the cause, to sustain their verdict? In our opinion, there was a clear preponderance of competent evidence in support of the verdict in this cause. From the peculiar character of this cause, a much wider field for investigation was opened up than ordinarily arises in such cases. And we must say, that, in our opinion, the appellee fully sustained, by competent evidence, his account of the relations of himself and the appellant, as between themselves, to the note in suit, in every important particular.

In conclusion, we add, that for the reasons given, the

Hickman *et al.* v. Rayl.

court below did not err in overruling the appellant's motion for a new trial.

The judgment of the court below is affirmed, at the appellant's costs.

HICKMAN ET AL. v. RAYL.

LANDLORD AND TENANT.—*Lease.—To Commence in the Future.—Breach.—*

Where, by the terms of a lease of lands, for a term to commence at a specified time in the future, the lessor binds himself to make certain stipulated improvements or repairs on such lands, prior to the time when possession is to be given and such term to commence, the lessee may refuse to accept possession thereof, if, at such date, such repairs or improvements shall not have been made; such failure constituting a breach of the terms of the lease.

SAME.—*Failure to Perform.—Act of God.—*The fact that the lessor was prevented from making such repairs or improvements by circumstances over which he had no control, even by the act of God, is no excuse for his failure.

SAME.—*Offer to Compensate.—Defence.—*Such failure is a breach of the terms of the lease, which can not be mended by an offer, by the lessor, to compensate the lessee for all damages he may sustain thereby; nor by an averment that such breach was one by which the lessee could sustain no damage.

SAME.—*Contract.—Promissory Note Given for Rent.—Action Upon.—Defence.—*If, upon the execution, in writing, of such lease, containing such stipulations, a promissory note be executed by the lessee, to the lessor, for the rent of such term, each is but part, and both together the whole, of one contract; and if, because of the failure of the lessor to put the premises leased in the condition so agreed upon, the lessee shall have failed and refused to accept possession thereof, the latter, in an action against him, by the lessor, upon such note, may aver and prove such failure by the lessor, as a defence to the entire action.

SAME.—*Partial Performance by Lessor Insufficient.—*Where, in such action, the stipulation to have been performed by the lessor was the erection, by the time that possession was to have been given, of a certain fence upon the premises leased, part of which, only, had been so completed, the fact that he had been prevented from completing the remainder, being a portion crossing a stream, until after such date of possession, by reason of high water in such stream, does not constitute a good cause of reply to an answer by the lessee averring such failure.

Hickman et al. v. Rayl.

From the Switzerland Circuit Court.

S. Carter, W. R. Johnston and H. W. Harrington, for appellants.

C. E. Walker, J. A. Works and J. D. Works, for appellee.

BIDDLE, J.—This action is founded on a promissory note, made by the appellants to the appellee.

The answer to the complaint is as follows:

“That said note was executed by the defendant Silas Hickman, as principal, and by the defendant George W. Hickman, as surety for the said Silas, in consideration of the rent of a farm owned by the plaintiff, which he rented to the defendant Silas Hickman, by articles of agreement made between the said plaintiff and said Silas, on the same day the note was executed, and as a part of the same agreement, by which articles the plaintiff, in consideration of the obligation of the defendant Silas, thereafter named, agreed to rent to the said Silas the farm then owned by the plaintiff, in Egypt Bottom, Switzerland county, Indiana, for one year, commencing on the 1st day of March, 1873, and ending on the 1st day of March, 1874. And the plaintiff further agreed to put a new fence on his upper line, commencing at his barn, running thence north to the section line, said fence to be built by the 1st day of March, 1873. And the defendant Silas agreed, that he would return said farm to the plaintiff in as good order as he received it, ‘accidents by the elements excepted;’ to haul and spread upon said farm the manure from around the barn on said farm; to deliver said farm to the plaintiff, on the 1st day of March, 1874, and to execute to the plaintiff his note for one thousand one hundred and twenty-six dollars and sixty-six cents; that said note was given for no other or different consideration, in whole or in part, whatever. And the defendants aver, that the plaintiff, on the 1st day of March, 1873, did not deliver to the defendant Silas the possession of said farm, or any part of it, although he demanded of the plaintiff the possession of

Hickman et al. v. Rayl.

the same, according to the terms of said agreement; but, on said day, the plaintiff was in possession of the dwelling-house on said farm, and residing therein with his family; that the barn on said farm was in possession of the plaintiff on said day, and had six hundred bushels of corn in the same; that all his stock was still on said farm, and he could not deliver possession thereof, together with the dwelling-house and barn thereon; and that he had not built said fence, or any part thereof, by said 1st day of March, 1873; and that said defendant Silas never entered into or took possession of said farm, or any part thereof, for the reason that said plaintiff was in the possession of the dwelling-house, and residing therein with his family, and that said barn was occupied by the plaintiff's corn, and plaintiff's stock was on said farm, on said 1st day of March, 1873, and because the plaintiff had not built said fence, by said day. Wherefore," etc.

A copy of the agreement was made an exhibit with the answer.

The plaintiff replied to the answer:

First. The general denial; and,

Second. As follows: "That before the first day of March, 1873, he had rented a house in the town of Vevay, Indiana, for a year, paying in advance one hundred dollars thereon; and before the 1st day of March, 1873, he, with his family, had moved out of said house on said farm, with his household furniture, and was then and there ready and willing to give to the said Silas possession of said house and farm, on said 1st day of March, 1873, if he would accept the same; that he had removed the stock off of said farm, and as to the corn in the barn, plaintiff called on defendant Silas, one week before the 1st day of March, 1873, and told him said corn was there, but that he, the plaintiff, would have all the same removed off of said farm, before the first day of March, 1873, if the said Silas insisted, but would like to leave the corn in the barn until the weather was more favorable for hauling it

Hickman et al. v. Rayl.

away, if he, Silas, would consent thereto; and he avers that Silas did then and there answer that plaintiff might leave said corn in the barn until it was convenient to remove the same, and told plaintiff that he did not want to use the barn until fall, and that said plaintiff might leave the corn in the barn until then, if he wished. And he says, that, as to the building of said fence on his upper line, in plenty time to complete said fence before said 1st day of March, 1873, he procured hands to build the same, and procured posts and hands to make said fence, and proceeded to dig the holes for the posts along the whole line of said fence, and placed the posts at the holes, to be put up, and proceeded to put up said fence; but that there is a creek which puts into the Ohio river, across said upper end of said farm, where said fence was to be built, and that prior to said 1st day of March, 1873, and while plaintiff was erecting said fence, said Ohio river rose very high, and forced the backwater up into said creek, filling up the holes dug for said fence at the place where said creek crossed said line, and floating off the posts and timber laid along the line of the fence, and rendering it impossible to go on and make said fence until the river should fall, and until after the first day of March, 1873. And he avers, that so soon as the river did fall, he went on and completed said fence where said creek crossed said upper line of said fence, being forty or fifty panels of fence; and that but for said rise in the river, he could and would have completed the whole of said fence before the 1st day of March, 1873, but was prevented therefrom by said high water, only. And he further avers, that before the 1st day of March, 1873, he had made all the rest of said fence, except the part in said creek, which was also completed before the 20th day of March, 1873. And he further avers, that said fence was not necessary to the protection of said farm on the 1st day of March, 1873, nor afterwards while said water remained up; and the defendants could not be damaged in the possession and use of said

Hickman et al. v. Rayl.

farm by reason of said small portion of said fence being incomplete until the 20th of March, 1873. And the plaintiff, on said 1st day of March, offered to said Silas to pay for any and all damage he might sustain by reason of said fence being incomplete, and to give him surety for the payment of any such damage. He further avers, that under and by reason of said contract, he had, before the 1st day of March, 1873, sold off his stock and farm implements, and removed to the town of Vevay, and thereby putting himself in a condition not to cultivate said farm for said year 1873, and that he kept said farm ready for said Silas, until the 20th day of April, 1873, and offered him possession, and requested him to take possession thereof; but the said Silas, on the 19th day of April, 1873, wholly refused to take possession of said farm, and the time for renting being gone by, the said plaintiff lost the use of said farm for said year, and sustained damages to the amount of said note. Wherefore," etc.

There is a third paragraph of reply which we do not set out, because we think the question decisive of the case arises upon the second paragraph.

The defendants filed a demurrer to the second paragraph of reply, alleging as ground the insufficiency of the facts therein averred. The demurrer was overruled, and exceptions reserved. Issues were joined, a jury trial had, a verdict returned in favor of the plaintiff for one thousand two hundred and twenty-seven dollars and ninety cents, and judgment—over a motion for a new trial and exceptions taken—rendered upon the verdict. During the trial, the court refused certain instructions asked by the defendants, and gave certain instructions asked by the plaintiff, over the objections of the defendants. To these rulings the defendants reserved exceptions; but they only raise the same question presented by overruling the demurrer to the second paragraph of reply. The solution, therefore, of the one question, as we have remarked, will decide the whole case.

Hickman et al. v. Rayl.

The counsel upon both sides have aided us much in this investigation. They have shown marked ability and unusual research, and we take pleasure in acknowledging the benefits we have derived from their learning and industry.

The making of the note sued on and the execution of the agreement set up in the answer were simultaneous acts, done by the same parties, about the same subject-matter; the note and the agreement, therefore, belong to the same transaction, and, taken together, constitute but one contract, as much as if they were written on the same piece of paper. This is a principle so well established that it needs no support from authority.

A party can not recover on a special contract which he has failed to perform on his part. "It is a good defence to an action on a contract, that the obligation to perform the act required, was dependent upon some other thing which the other party was to do, and has failed to do. And if, before the one party has done any thing, it is ascertained that the other party will not be able to do that which he has undertaken to do, this will be a sufficient reason why the first party should do nothing. And this excuse is valid, although the omission by the other party to do the thing required of him, was produced by causes which he could neither foresee nor control. And if it is provided that the thing shall be done 'unless prevented by unavoidable accident,' the accident to excuse the not doing, must be not only unavoidable, but must render the act physically impossible, and not merely unprofitable and inexpedient by reason of an increase of labor and cost." 2 Parsons Con. 675, 676.

"Every lessor binds himself to give possession, and not to give the party to whom he demises a mere right to take possession from a wrong-doer by an action of ejectment; and every lessee binds himself to accept possession and pay rent. If a party has agreed to take a house from a particular day, provided certain things are before then done by the

Hickman et al. v. Rayl.

landlord, and the things are not done, he may decline to go on with the contract, and may refuse to take possession." 2 Addison Con., sec. 690. We think these elementary principles, as applicable to the case under consideration, are sustained by the authorities. *Spencer v. Burton*, 5 Blackf. 57; *Coe v. Smith*, 1 Ind. 267; *McCulloch v. Dawson*, 1 Ind. 413; *Heaston v. Colgrove*, 3 Ind. 265; *Maggart v. Chester*, 4 Ind. 124; *Johnson v. Powell*, 9 Ind. 566; *Allen v. Nofsinger*, 13 Ind. 494; *Morton v. Kane*, 18 Ind. 191; *Cromwell v. Wilkinson*, 18 Ind. 365; *Larimore v. Hornbaker*, 21 Ind. 430; *O'Kane v. Kiser*, 25 Ind. 168; *Clark v. Butt*, 26 Ind. 236; *Ireland v. Montgomery*, 34 Ind. 174; Co. Lit. 45 b.; *Salman v. Bradshaw*, 4 Cro. Jac. 304; *Andrews v. Paradise*, 8 Mod., Case 240; *The Fitchburg Cotton Man'f'g Corp. v. Melven*, 15 Mass. 268; *The Bank of Columbia v. Hagner*, 1 Pet. 455; *Lawrence v. French*, 25 Wend. 443; *Wilson v. Martin*, 1 Denio, 602; *Christopher v. Austin*, 1 Kern. 216; *Grant v. Johnson*, 1 Seld. 247; *Strohecker v. Barnes*, 21 Ga. 430; *Chatterton v. Fox*, 5 Duer, 64; *Hurlbut v. Post*, 1 Bosw. 28.

Upon principle, and under these authorities, we think the second paragraph of reply is defective in several points. It shows that the appellee did not deliver possession of the premises to the appellant, according to the stipulations in the lease; and therefore that he first broke the contract. We need not decide whether the rise of the Ohio river, by which the appellee was for a time prevented from completing the fence, was the act of God, which would excuse the appellee from making the fence, because if it had been such an act, he could not compel the lessee to accept the premises upon any other terms than those provided in the lease. How far the rise of the river would excuse the appellee, if he was sued for a breach of his part of the contract, is a question not before us. But we are very certain it does not excuse him from delivering the premises to the lessee according to the terms of the lease. If a landlord should let a house for

Hickman et al. v. Rayl.

years, and the term was to commence at some future day, and in the mean time lightning should destroy the house, no one would contend that the lessee was bound to accept the premises. The excuse, therefore, alleged in the reply for not completing the fence, is insufficient. Nor can the appellee mend the breach he made in the contract by offering to compensate the appellant in damages, nor by alleging that he did not sustain damages. The appellant was entitled to the premises in the condition and at the time agreed upon, and he was not bound to accept them in any other condition, or at any other time.

There is a class of cases, however, where the agreement does not go to the whole of the consideration on both sides, and where the supposed condition is distinctly separable from other parts of the agreement, so that much of the contract may be performed on both sides, as though the condition were not there, it will be held as a stipulation, the breach of which only gives an action to the injured party. This doctrine originated, we believe, in the case of *Boone v. Eyre*, in the King's Bench, Easter term, Geo. III. See, 1 H. Bl. 273, note *a.*, and 2 W. Bl. 1312. But, upon a close examination of the case, it will be noticed that it was put upon the ground that the covenants had been in part executed; ASHHURST, J., declaring, that in such cases, "There is a difference between executed and executory covenants." And the same principles were declared by LORD KENYON in *Campbell v. Jones*, 6 T. R. 570; *Pickens v. Bozell*, 11 Ind. 275; *Boyle v. Guysinger*, 12 Ind. 273; *Morton v. Kane*, *supra*. But we are not embarrassed by these decisions in this case, because the agreements go to the whole consideration on both sides—the lease was the consideration of the note, and the note was the consideration of the lease; and no part of the contract, on either side, was ever performed.

There is another class of cases wherein the condition precedent has been partly performed by one party, whereby

Graham v. Castor.

the other party receives and accepts a benefit, in which it has been held that the party so partly performing his agreement may recover, against the party so benefited, the value of the thing granted or the services rendered, subject to all fair, equitable deductions; *Adams v. Cosby*, 48 Ind. 153.

All the authorities cited by the appellee, we believe, belong to this class of cases; at least none of them invade the principles to which we adhere in the decision of this case.

The judgment is reversed, and cause remanded, with instructions to sustain the demurrer to the second paragraph of reply.

GRAHAM v. CASTOR.

CONTRACT.—Agreement to Maintain.—Conveyance.—Rescission.—Fraud.—Real Estate, Action to Recover.—Reformation of Instrument.—Judgment Notwithstanding Verdict.—A complaint to recover a tract of land alleged that it had been conveyed by the plaintiff to the defendant, in consideration of a written agreement executed by the latter, binding him to comfortably maintain the former during life, in a home on such land; that the defendant, taking advantage of the old age and infirmities of the plaintiff, had defrauded him by causing a penalty, in an amount much less than the value of the land, to be inserted in such agreement, without the knowledge of the plaintiff, and by then failing and refusing to provide such maintenance, whereby the plaintiff was left without a home or means to subsist. Upon the trial, the jury found, generally, for the plaintiff, and, specially, that such contract had been honestly entered into, that the defendant had always been able and willing to maintain the plaintiff, and that he had furnished such maintenance until the plaintiff had voluntarily left and declined to return to the defendant's house.

Held, that the defendant was only bound to furnish such maintenance to the plaintiff at his home on such land;

Held, also, that, no demand having been made therefor in the complaint, the plaintiff is not entitled to have such contract reformed by increasing the penalty of such bond; and,

Held, that mental feebleness, not amounting to an absolute incapacity

Graham v. Castor.

to contract, is not sufficient to justify a rescission of a contract honestly entered into; and, therefore,
Held, that the defendant is entitled to a judgment in his favor, upon the answers to interrogatories, notwithstanding the general verdict.

From the Hamilton Circuit Court.

D. Moss and T. J. Kane, for appellant.

W. Garver, J. S. Losey and R. Graham, for appellee.

WORDEN, J.—This was an action by the appellee, against the appellant.

The complaint was in two paragraphs.

The first alleged that on January 19th, 1870, the plaintiff, by deed duly executed, conveyed to the defendant, who was the plaintiff's grandson, certain real estate described; and that the defendant, at the same time, executed to the plaintiff the following bond, viz.:

"State of Indiana, Hamilton county: I, Alfred Graham, acknowledge myself bound to Sarah Castor in the sum of five hundred dollars. The condition of the above is as follows, to wit:

"Whereas Sarah Castor has conveyed to the said Alfred Graham the following real estate, to wit," (description) "the said Alfred Graham does agree to maintain the said Sarah Castor, her natural lifetime, in a manner suitable to her age and condition in life, and to be at all expense necessary for her comfort in life; also, for medical attendance and funeral expenses. Now, if the said Alfred Graham shall maintain the said Sarah Castor on the aforesaid real estate, as he has agreed to, then this obligation shall be void, else in full force. In witness whereof I have hereunto set my hand and seal, this 19th day of January, 1870.

[Signed]

"ALFRED GRAHAM."

The paragraph alleges, that, at the time of the execution of the papers, the plaintiff was more than ninety years old, and very feeble in body and mind, and that the defendant was a young man, in the vigor of manhood,

Graham v. Caster.

shrewd and avaricious; that she had unbounded confidence in his honesty and integrity, and paid little attention to the reading of the contents of the instrument, confidently believing that he would do nothing to circumvent or take advantage of her in any manner whatever, but, firmly relying on his agreement to provide for her, as specified in said bond, she executed the deed and accepted the bond. That the recital in the deed, stating that the consideration for the land was one thousand six hundred dollars, is untrue, and that there was, in fact, no consideration for the land, except the defendant's agreement; that, at the time of the execution of the instrument, the plaintiff did not know that the consideration was stated in the deed to be one thousand six hundred dollars, nor that the penalty in the bond was but five hundred dollars; that the defendant had promised her to make the penalty equal to the value of the land; that she was, and is now, entirely blind, and did not examine the contents of the bond, but believed, at the time the deed and bond were executed, that they were in accordance with the defendant's previous promises; that if the instruments were read to her, she had no distinct or clear idea of their contents; that she can not now remember whether they were read to her, or not, previous to her signing the deed. That, in pursuance of the contract, as the plaintiff understood it, she delivered the possession of the lands to the defendant, with whom she commenced to live, and resided with him until 1873, when the defendant voluntarily took her away from his residence and carried her to Noblesville, into the family of John W. Deeds, a distance of some miles, where she has ever since continued to reside, for two reasons: first, because she has been too weak and feeble in health to bear the fatigue of being again removed back to the defendant's residence; and, second, for the more urgent reason, that the defendant and his family are totally incompetent and unable to bestow that care and attention

Graham v. Castor.

upon her, which the necessities of her great age and debility require. That during the time of the plaintiff's residence with the defendant, he violated his agreement, in this: that she was totally neglected and uncared for in her most urgent and necessary wants; that she was not comfortably nor decently clad; that the room provided for her was uncomfortably cold during the winter; that her food was not at all suitable to her age and condition; that the family treated her roughly and unkindly. That not only her comfort and happiness, but her life, would be endangered, if she were compelled to again return and stay with the defendant. That the penalty of the bond is not adequate to the amount of damages she might sustain in consequence of the defendant's failure to perform the contract on his part, and not one-fourth of the real value of the land; that the plaintiff never knew the amount of the penalty of the bond, or the terms of the deed, until about a week before she employed an attorney to commence this action. That the defendant has had the use and rent of the land ever since the contract, which is worth more than the cost of boarding, lodging, clothing and care bestowed upon the plaintiff during that time. Wherefore, she prays that said contract, deed and bond be rescinded, set aside and held for naught, and for other relief.

The second paragraph alleged the making of the deed by the plaintiff, to the defendant, for the land, and the execution by the defendant of the bond, averring that the bond was the only consideration for the land, and that the defendant had failed to comply with the conditions of the bond, in this: that in June, 1873, he took the plaintiff to the house of John W. Deeds, and left her with the family of Deeds, where she has been ever since, and has been cared for by Deeds and his family. That soon after she went to the house of Deeds, she contracted and bargained with him that she would pay him whatever his services were worth in taking care of, boarding

Graham v. Castor.

and lodging her, and washing for her. That his services were worth nine hundred dollars, in thus providing for her, from the time she went there to the commencement of this suit. That since she went to the house of Deeds she has been very feeble and helpless, and has, during all that time, needed a great deal of care and attention; that the defendant, though well knowing her wants and necessities, has wholly failed to pay her any thing whatever, or defray any part of such expenses; that she has no means sufficient to pay for the services thus rendered her by Deeds, and that the defendant well knew her want of means or ability to pay Deeds for his services, which were worth forty dollars per month, amounting to nine hundred dollars, which sum is now due him from the plaintiff, and which she has no means to pay. Wherefore, she prays judgment for one thousand dollars, and that the contract be rescinded, and for other relief.

After demurrers to each paragraph of the complaint had been overruled, the defendant answered by general denial, and the cause was submitted to a jury for trial, which resulted in a general verdict for the plaintiff, as follows, viz.:

“We, the jury, find for the plaintiff, that she is entitled to the land in controversy, and that the defendant is equitably entitled to the sum of five hundred dollars.”

The jury also returned the following answers to interrogatories propounded to them at the instance of the plaintiff, viz.:

“1st. What was the value of the services rendered by the defendant to the plaintiff, in caring for and maintaining her during the time she was in his family, from the execution of the contract, until she left, in June, 1878?

“Answer. Seven hundred and fifty dollars.

“2d. What is the value of improvements made on the lands in controversy, since the execution of the contract?

“Answer. Two hundred dollars.

Graham v. Castor.

"3d. What is the value of the rent of the lands, since the defendant has had possession under the contract?

"Answer. Four hundred and fifty dollars.

"4th. What was the consideration paid by the defendant for the lands?

"Answer. The contract.

"5th. What maintenance has the defendant furnished the plaintiff since June, 1873?

"Answer. None.

"6th. Was not the only consideration for the land the bond or agreement mentioned in the complaint?

"Answer. Yes.

"7th. What was the value of the services in maintaining the plaintiff from June, 1873, to the present time?

"Answer. Four hundred dollars.

"8th. Was not the plaintiff, at the time of the execution of the contract, in a very feeble state of mind and body?

"Answer. Yes.

"9th. Was not the defendant in good health, mentally and physically, and was he not a man of ordinary shrewdness, at the time of the execution of the contract?

"Answer. Yes.

"10th. What was the value of the land at the time of the contract?

"Answer. Fourteen hundred dollars.

"11th. What is the amount of the penalty of the bond?

"Answer. Five hundred dollars."

At the instance of the defendant the jury returned the following answers to interrogatories propounded by him:

"1st. Was not the contract, embracing the deed and bond mentioned in the complaint, honestly entered into by the parties thereto?

"Answer. Yes,

"2d. Did not the defendant perform the contract on his part, from the 19th day of January, 1870, to some time in June, 1873?

Graham v. Castor.

"Answer. Yes.

"8d. Did not the defendant then take the plaintiff to the residence of John W. Deeds, mentioned in the complaint, for the purpose of making a visit, at her own request, as well as at the request of said Deeds?

"Answer. Yes.

"4th. And did not the defendant, shortly after the plaintiff was so taken to the residence of said Deeds, offer to take her back to his residence, for the purpose of maintaining her according to the terms of his contract?

"Answer. Yes.

"5th. Has not the defendant always been ready, willing and able to maintain the plaintiff on the premises she conveyed to him, in pursuance of the terms of his contract?

"Answer. Yes."

The defendant moved for judgment in his favor on the answers to interrogatories, notwithstanding the general verdict, but the motion was overruled, and he excepted.

Final judgment was rendered in favor of the plaintiff, against the defendant, setting aside the conveyance of the land made by the plaintiff to the defendant, and that the defendant recover of the plaintiff one hundred dollars.

We see no ground on which this judgment can be maintained, or, indeed, any other judgment in favor of the plaintiff, against the defendant. And we are of the opinion that the defendant was entitled to a general judgment in his favor, on the answers of the jury to interrogatories, notwithstanding the general verdict.

The case may be viewed in two aspects; as seeking, first, to set aside the conveyance made by the plaintiff to the defendant; and second, the recovery of damages for the alleged breach by the defendant of his contract.

There was no ground for a rescission of the contract. The jury found that it was honestly entered into by the parties, and this excludes the idea that any fraud what-

Graham v. Castor.

ever was practised by the defendant. We take it that fraud of any kind is entirely incompatible with honesty.

The plaintiff was old and feeble, bodily and mentally; but feebleness of mind, unless it is so great as to take away the capacity to contract at all, which is not alleged or claimed in this case, is not, of itself, sufficient ground on which to set aside a contract.

If the penalty of the bond was not as large as the parties had agreed upon, it might have been reformed, upon a proper case made for that purpose; but no case was made here for a reformation.

The answers of the jury show, also, that the defendant had not broken the contract on his part, and, therefore, he was not liable for damages. By the terms of the contract the defendant was bound to provide the plaintiff her maintenance, on the land conveyed by her to him. He was not bound to furnish such maintenance elsewhere, wherever she might choose to go and take up her abode. Now, the answers of the jury show that the defendant performed his contract, up to the time when the plaintiff went to the house of Deeds on a visit, and that he shortly afterwards offered to take her home, for the purpose of maintaining her according to his contract, and that he has always been able, ready and willing to maintain the plaintiff on the land mentioned, in accordance with the terms of his contract.

The answers of the jury to the interrogatories show that the defendant has not, in any manner, violated or broken his contract.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment for the defendant.

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Eby.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
EBY.

RAILROAD.—*Fence.—Cattle-Guard.*—To keep its road “securely fenced,” according to the requirements of the statute, a railroad company must construct and keep in repair sufficient cattle-guards, on each side of highways crossing its track.

SAME.—If a cattle-guard be in such condition that stock can pass over it, from a highway, onto the track of the railroad upon which it is situated, such road is not “securely fenced,” within the meaning of the statute.

SAME.—*Killing Stock.—Failure to Repair.*—If, by reason of a railroad company's neglect to repair a cattle-guard accidentally put out of repair, of which it has had reasonable notice, stock enter upon its track, over such cattle-guard, from a highway, and are killed, such company is liable therefor.

From the Grant Circuit Court.

N. O. Ross, for appellant.

R. W. Bailey and A. Diltz, for appellee.

PERKINS, C. J.—Suit by appellee, against appellant, to recover the value of a horse, killed by a train of cars on appellant's road, at a point where it is alleged the same was not securely fenced. The complaint was in two paragraphs; the second alleged negligence in the killing, and set out the facts showing wherein the said railroad was not securely fenced. Answer in general denial; jury trial; verdict for plaintiff; motion for a new trial for the following reasons :

1. The verdict of the jury is contrary to law.
2. The verdict of the jury is contrary to the evidence.
3. The verdict is not sustained by sufficient evidence.

The motion was overruled and exceptions reserved. A motion in arrest followed, on the ground that the complaint did not contain a cause of action.

The motion was overruled, the ruling excepted to, and final judgment rendered for the appellee.

The complaint contained a cause of action.

The evidence is in the record.

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Eby.

The plaintiff, to sustain the issues on his part, introduced the following testimony :

Jacob G. Eby.—“Am plaintiff in this suit. I live west of town, near the railroad. I missed my horse and looked for him, but could not find him. I heard a train pass, and went down to the railroad, and found the horse on the railroad, killed. It was the 15th day of February, 1875, in Grant county, Indiana. I saw by the tracks that the horse had crossed right on the cattle pit. The cattle-guard way was as good as none, not more than fifteen inches deep, from ties to bottom, when there was no snow. It was filled with snow. The cross-pieces were from six to nine inches wide. The horse passed over it. It was full of snow, and had been for two weeks. It would be hard for a man to tell where it was. The horse belonged to me, and was worth eighty dollars.”

On cross-examination the witness testified : “The horse was thirty yards from the cattle-guard. The marks showed he was just at the cattle pit, on the inside, when he was struck, and was carried on to where I found him. The marks were on the road and on the ties, all along from the cattle pit to where he was lying. The cattle pit was filled with snow. Have seen cattle pass over it when there was no snow. I had the horse in the stable, and some friends came to my house, and I turned the horse in the barn-yard. There was a gate from the yard to the highway, and the horse must have got out on the highway, through it, and gone down on the railroad. I don't know how the gate came open, nor who opened it.

It was in evidence that some roads made cattle-guards with cross-pieces bevelled upwards, and some did not.

David Sliger testified : “I heard the horse was killed. I saw him a day or two after he was killed. He was fifteen or twenty steps east of the cattle-guard. The cattle-guard is in bad condition. I drove hogs over it when there was no snow. It was filled with snow when I saw

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Eby.

it, after the horse was killed. The ties are about five inches apart, and six to nine inches wide on the top."

Cross-examined: "The hogs went over the cattle pit."

George Sliger testified: "I saw the horse directly after he was killed. He was not entirely dead when I got there. He was from twenty-five to thirty yards from the cattle-guard. Saw tracks where the horse was struck, inside the cattle-guard, in field. He was dragged over the ties. Saw horse tracks inside the field. The cattle-guard was full of snow. The guard was filled with snow, and had been so for ten days. He was a good farm horse, but not a salable horse. A common farm horse; think he was worth seventy-five or eighty dollars. There was not a recent snow, as the tracks in the road were not filled."

On cross-examination the witness testified: "The horse was struck just at the cattle-guard, and was dragged along to where he was when found. The highway crosses the railroad there, and the horse must have been in the highway, and got on or over the cattle-guard, from the highway."

Allen Druckenmiller testified: "I owned the horse killed, at one time. I saw him lying along-side of the track, about twenty-five yards from the cattle-guard. The cattle-guard was full of snow, at the time. Think the horse was hit, ten or fifteen feet from the cattle-guard. Snow had been on the ground four or five days, from first snow."

John Brownlee testified: "The name of defendant's road was Pittsburgh, Cincinnati and St. Louis Railway Company."

The defendant, to sustain the issue on her part, then introduced the following testimony:

Michael Marnan testified: "I am working on the railroad of the defendant; I pass on the road every day; was on it the day the horse was killed; I saw the hair on the ties, on the west side of the cattle-guard, on the public highway; the cattle pit must be between three and four feet deep, below the ties, and was in good order; it is now, and was all the time; it is an ordinary cattle pit; the

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Eby.

fences were in good order, and sufficient to turn stock; I pass over that part of the road, where the horse was killed, every day."

On cross-examination, the witness said: "The hair on the ties I saw was next the highway, and the marks were on the ties, all along to where the horse was found; there was snow in the cattle-guard; it had been drifted some in the road, and was on the ties over the cattle-guard, but it was not packed down so a horse could walk over them without sinking in the snow."

Daniel Marnan testified: "I am section 'boss' on the railroad west from Marion; I know the cattle-guard referred to; it is four feet deep; I was at the cattle-guard, on the 15th day of February last; the snow fell the day before, and had drifted on the ties and obscured the view somewhat; there were wing fences from the cattle-guard, sufficient to turn stock; I examined the place where the horse was struck; he was struck in the highway, just at the cattle-guard; I could see the marks in the road, and on the ties, where he was hit."

On cross-examination, the witness said: "It was soon after the horse was killed I went there; I went to see, for the purpose of knowing where he was killed; it is part of my business to look after such things; the cattle-guard was in good order; there was some snow in it, and snow had drifted so that a man approaching it would not see as plainly as if no snow was there; I measured the cattle-guard, and it was four feet deep and in as good condition as any guard on the road, and was such as is usually made."

Patrick Glanin testified: "I am working on the road, and have seen the cattle-guard where the horse was killed, every day in the week. It was in good order. I did not examine the place where the horse was hit. I saw hair on the ties, on the wagon-road side of the pit. The cattle-guard was not filled with snow."

On cross-examination, the witness testified: "There was snow in the cattle pit, but it was not filled, and there

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Eby.

was three feet space in the pit, below the ties. I know, because I looked at it, and we passed over it every day in our work. We went out there, when we heard the horse was killed, to see about it."

Richard Criswell testified: "I don't know the horse of Eby's, that was killed. I think I have seen him hitched up here in town."

L. M. Hiatt testified: "I don't know the horse that was killed. I owned a sorrel horse called Mike; he was poor when I owned him; was a good work horse."

Samuel Blinn: "I owned the horse twice, about one year before he was killed. He was twelve or fourteen years old. He was run in a 'bus at Xenia. I think he was worth sixty-five or seventy dollars."

The plaintiff, in rebutting, introduced Jacob G. Eby, the plaintiff, who testified:

"I made a close examination as to the place where the horse was struck, and there was no hair on the highway side of the cattle-guard. I was there the day the horse was killed, before the section men were."

In *The Indianapolis, etc., R. R. Co. v. Irish*, 26 Ind. 268, it is decided that the duty of placing suitable cattle pits at the crossings of highways, etc., results from the statutory requirement that a railroad shall be securely fenced, to relieve its owner from liability to pay for animals killed by its cars and locomotives. According to this decision, such pits are parts of the road fences. These fences, including the cattle-guards or pits, must, as a general rule, be kept by the company in a condition to accomplish the purpose for which they are constructed. And when they are accidentally put out of such condition, the company will be relieved of her liability for stock killed, for a reasonable time after notice or knowledge of the change in condition, to enable the railroad company to restore them to the proper condition. *The Toledo, etc., R. W. Co. v. Cohen*, 44 Ind. 444; *The Cleveland, etc., R. R. Co. v. Brown*, 45 Ind. 90.

Tracewell v. Peacock et al.

The question in this case, then, is one simply of fact. It is this: Was the horse in question killed by the locomotive and cars of the appellant, at a point where her road was not securely fenced? We answer this question in the affirmative, for the reason that the cattle-guard, or pit, if properly constructed at first, which we do not doubt, was suffered to remain an unreasonable length of time in a condition rendering it useless, after the company had notice of its condition, and before the accident occurred.

The judgment is affirmed, with costs.

TRACEWELL V. PEACOCK ET AL.

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PLEADING.—Conversion.—Set-Off.—Attorney.—Decedent's Estate.—To a complaint by the sole devisee of the estate of a testator, against an attorney at law, to recover, in part, for moneys alleged to have been collected by the latter upon choses in action so devised to the plaintiff, and, in part, for an alleged personal indebtedness of the defendant to the plaintiff, the defendant pleaded, by way of set-off, an alleged indebtedness of the estate of such testator to the defendant, for professional services rendered by him in the settlement thereof, but did not allege, either that such matter of set-off had been filed as a claim against such estate, or that such estate had been finally settled.

Held, on demurrer, that such answer is insufficient.

PRACTICE.—Demurrer to Bad Answer.—Effect Upon Complaint.—If an insufficient answer be pleaded to the whole of a complaint consisting of sufficient and insufficient paragraphs, a demurrer to such answer can not be so carried back as to sustain it to the insufficient paragraphs of such complaint.

SUPREME COURT.—Practice.—Waiver.—A failure by a party appealing to the Supreme Court to discuss, in his argument therein, an error assigned by him, is deemed a waiver thereof.

SAME.—Remittitur.—A remittitur below of the excess of damages there recovered so cures the finding or verdict that an assignment, as error, of the overruling of a motion for a new trial, based upon alleged excessive damages, is not available on appeal to the Supreme Court.

From the Harrison Circuit Court.

Tracewell v. Peacock et al.

G. V. Hawk, W. W. Tuley, W. T. Jones, S. H. Buskirk and J. W. Nichol, for appellant.

S. K. Wolfe, S. M. Stockslager and A. Stephens, for appellees.

BIDDLE, J.—Complaint by the appellees, against the appellant, containing seven paragraphs. Ella Peacock had been the wife of Samuel H. Keen, who died, and from whom she took by devise his entire estate. She afterwards intermarried with Simeon Peacock. The first, second and third paragraphs of the complaint charge that certain choses in action, belonging to the said Ella, which she took under the devise, came to the hands of the appellant, as an attorney, for collection, and which he collected and converted to his own use. The fourth paragraph is founded upon a judgment rendered by a justice of the peace, against the appellant, and in favor of Ella Peacock. The fifth paragraph counts upon a similar judgment. The sixth paragraph is brought to recover interest on said two judgments, at the rate of ten per cent., which it is alleged the appellant proposed to pay, in writing, by a letter, for the forbearance of the collection of said judgments, which proposition Ella accepted, and forbore the collection accordingly. The seventh paragraph is in the usual form of a common count for money had and received.

The appellant answered the several paragraphs of the complaint separately, and filed a fourth paragraph to the whole complaint, by way of set-off, as follows:

“That when this action was commenced, the estate of the said Samuel H. Keen, deceased, as whose legatee the plaintiff Ella Peacock sues in this action, was, and still is, indebted to the defendant in the sum of five hundred dollars, for work and labor done, and care, skill and services rendered, by the defendant as an attorney at law, in the administration and settlement of said decedent's estate, the particulars of which,” etc., are set forth in a specific account.

Tracewell v. Peacock et al.

Paragraph fifth is a similar answer to the whole complaint, alleging the indebtedness against Ella Peacock, instead of against the estate of Keen.

The fourth paragraph of the complaint was amended, and a demurrer to it, alleging as ground the insufficiency of facts, was overruled, and exceptions reserved. It was then answered. Replies were filed, issues joined, trial by the court had, and a finding for the appellees. Motion for a new trial. Causes filed:

1. Excessive damages;
2. Insufficient evidence;
3. Surprise; and,
4. Newly-discovered evidence.

Motion overruled; exceptions; judgment; appeal.

The assignments of error in this court are:

1st. Sustaining plaintiffs' demurrer to the fourth paragraph of defendant's answer;

2d. Refusing to strike out the third, fifth and eighth paragraphs of plaintiffs' reply;

3d. Refusing to sustain defendant's motion to suppress the depositions of C. E. Garner, James S. Sheppard and A. C. Fox;

4th. Overruling defendant's demurrer to the fourth paragraph of plaintiffs' complaint;

5th. Overruling defendant's demurrer to the second, sixth and tenth paragraphs of plaintiffs' reply; and,

6th. Overruling the defendant's motion for a new trial.

We will examine the alleged errors in the order they are assigned. We think the court properly sustained the demurrer to the fourth paragraph of defendant's answer. It sets up an indebtedness against the estate of Keen, which arose after his death. A dead man can not make a contract, either express or implied. The debt might be payable out of the assets of his estate, but the decedent could not be the debtor. The appellant should show that he had filed his claim, or that the estate had been finally settled.

But the appellant insists that the first and sixth paragraphs of the complaint are insufficient, for the want of facts alleged, and that although the fourth paragraph of answer may be held insufficient, yet the demurrer should be carried back through the record, and the complaint held insufficient also. The fourth paragraph of answer was pleaded to the whole complaint, and if the demurrer is carried back, it must also go to the whole complaint. The demurrer, by passing through the answer, can not become any more specific than if it had been aimed directly at the complaint; and several paragraphs of the complaint being sufficient, the demurrer, if aimed directly at the entire complaint, should have been overruled for that reason. It was therefore properly overruled to the complaint. If the fourth paragraph of the answer had been pleaded to an insufficient complaint, generally, or solely to an insufficient paragraph of a complaint, doubtless the question discussed by the appellants would have been properly raised, and, perhaps, their views sustained; but, as the record presents it, the court has committed no error in not carrying back the demurrer and sustaining it to the complaint.

The appellant, very commendably, abandons the second and third assignments of error. If they existed below, no ground was laid in the record to bring them here. He admits the amended fourth paragraph of complaint to be good, and abandons the fourth assignment of error, also. He also admits that the second, sixth and tenth paragraphs of reply, which were demurred to, are sufficient, and no further insists upon the fifth assignment of error. The only remaining assignment of error to be considered is the sixth, overruling the motion for a new trial. The third and fourth causes assigned for a new trial, if they ever existed, were healed below by a remittitur. The first and second causes depend upon the evidence. The appellees insist that the bill of exceptions is not properly in

The City of Peru *et al.* v. Bearss *et al.*

the record, and that if it was, it shows upon its face that it does not contain all the evidence given in the case. We have not nicely considered these questions, as the appellant's counsel did not "deem it necessary to examine the questions arising upon overruling the motion for a new trial," and has, indeed, virtually waived the sixth assignment of error. We have therefore not considered the evidence, as to its sufficiency to sustain the verdict or the amount of damages assessed.

The judgment is affirmed, with costs.

Howe, J., having been of counsel, was absent.

THE CITY OF PERU ET AL. v. BEARSS ET AL.

CITY.—Annexation of Territory.—County Board.—Power of.—Can Not Annex Part only of Lands Described in Petition.—Statute Construed.—Where, under the provisions of sections 85 and 86 (1 R. S. 1876, p. 311) of the act of March 14th, 1867, providing "for the incorporation of cities," etc., the common council of a city has filed its petition with the proper county board, asking that certain described lands, not platted, lying contiguous to such city, be annexed thereto, to which it is averred that the owner will not consent, such board has no power to order the annexation of a part, only, of such lands, but must grant or refuse the prayer of such petition as a whole.

SAME.—Partial Annexation Void.—Appeal.—An order of such county board, annexing to such city part, only, of such lands, is inoperative and void, but is one from which no appeal is authorized by law.

SAME.—Tax.—Injunction.—Where a city has assessed a tax for municipal purposes upon lands so annexed, its collection may be enjoined and such assessment cancelled, in an action therefor by the owner.

From the Miami Circuit Court.

J. M. Brown and N. O. Ross, for appellants.

R. P. Effinger and L. Walker, for appellees.

Howe, J.—In this action, the appellees were the plaintiffs, and the appellants were the defendants, in the court below.

55	576
143	245

55	576
150	574

55	576
168	257

The City of Peru et al. v. Bearss et al.

In their complaint the appellees alleged, in substance, that the appellees Daniel R. Bearss, James N. Tyner and John H. Jack were citizens and property holders of Peru township, in Miami county, Indiana; that the appellee The Howe Machine Company was a corporation organized under the laws of Connecticut, and doing business in this State, under the laws thereof; and that the appellee The Indiana Manufacturing Company was a corporation organized under the laws of, and doing business in, this State; that each of the appellees was the owner in fee-simple of a separate parcel of real estate in Peru township, in said Miami county, particularly and separately describing the parcel or parcels owned by each of the said appellees; and the appellees alleged, that there were many other owners of real estate in said Peru township, who were affected by the subject-matter of this controversy, who were too numerous to be joined as parties plaintiffs in this action, but on whose behalf, as well as that of the appellees, the complaint in this action was filed; that at the December term, 1873, of the board of commissioners of said Miami county, the appellant The City of Peru filed a petition addressed to said board, for the annexation to said city of certain lands adjoining said city, including the lands of the appellees, severally, particularly described in said complaint, so as to include the large and valuable factory buildings thereon situated, as well as the lands of other citizens of said Peru township, a full description of which lands, so sought to be annexed to said city, appeared in said petition, which was a part of the record of said board of commissioners, a full copy of which record, so far as the same related to said attempted annexation, was filed with and made part of said complaint. And the appellees said, that the said board of commissioners did not grant the prayer of said petition, by the annexation of the lands described in the petition and notice, as set out in said record; but that the said board

The City of Peru et al. v. Beards et al.

unlawfully, and without any proper notice or petition therefor, but on the petition for and notice of the annexation of a larger quantity of land, as appeared in said record, made an order for the annexation to said city of a part only of the lands described in said petition and notice, including the lands of the appellees, particularly described in said complaint, and the lands of many other citizens of said township, a copy of which order and description of the territory so unlawfully ordered to be annexed to said city appeared in said record, a copy of which was filed as aforesaid with, and made a part of, said complaint.

And the appellees further alleged, that after the making of said order, the said City of Peru, by its proper officers, but wrongfully and unlawfully, caused to be entered upon its duplicate for municipal taxation, the lands included in said pretended annexation, and the personal property held and owned within said limits; that there were so wrongfully assessed, against each of the appellees, taxes for the year 1874, the specific sum against each appellee being set out in said complaint; as well as taxes in various amounts against all the owners of lands included in said pretended annexation; that the appellant The City of Peru was engaged, by her officers, in assessing the lands and other property of the appellees and others in the said territory, for the year 1875, for the purposes of municipal taxation, and had levied a tax upon the same, and claimed and asserted the power and right to levy and collect such taxes, by virtue of the said order of said board of commissioners; that the appellant The City of Peru, by its co-appellant, James G. Goldsmith, the treasurer of said city, was about to levy upon the property of the appellees, to satisfy said illegal taxes for the year 1874; that the acts of said city in the premises have cast a cloud upon the title of the appellees and others to their said lands, and impaired and diminished their value, and disturbed them in the quiet enjoyment of the same; and

The City of Peru et al. v. Beams et al.

that unless an order of the court below was made, restraining the appellants from making such levy and asserting such pretended right of taxation, the appellees and others would be obliged to resort to protracted, vexatious and expensive litigation to protect their rights in said property, and would suffer great and irreparable loss and damage in the premises.

Wherefore, the appellees prayed for a temporary restraining order, and, upon the final hearing, for a perpetual injunction against the appellants' levying or collecting any pretended tax, under or by virtue of any supposed or pretended right, given by said order of said board of commissioners, and for all other proper and just relief.

Appellees' complaint was duly verified, and the undertaking required by law was therewith filed. A full copy of all the annexation proceedings mentioned in said complaint, is in the record; but, for reasons which will hereafter appear, we need not now set out any abstract or summary of any of these proceedings.

The appellants demurred to appellees' complaint, for the want of sufficient facts therein to constitute a cause of action, or to entitle the appellees to the relief prayed for, or to entitle them to any relief. This demurrer was overruled by the court below, and to this decision the appellants excepted. And the appellants failing and refusing to plead further, a judgment or decree, *pro confesso*, was entered by the court below, in favor of the appellees and against the appellants, for a perpetual injunction, as prayed for in appellees' complaint.

In this court, the only alleged error assigned by the appellants is this: That the court below erred in overruling the appellants' demurrer to the appellees' complaint.

In their brief of this cause, in this court, appellees' counsel have, as we understand them, limited the questions, presented by the record, to a single inquiry. They say, in their brief:

The City of Peru et al. v. Bearss et al.

“The City of Peru took the necessary steps, as provided in said section 85,” (of the general law for the incorporation of cities, approved March 14th, 1867,) “for the annexation of a very considerable quantity of territory, contiguous to its boundaries. It entered the necessary resolution upon its records. It filed a proper petition before the board of commissioners, setting forth the reasons for such annexation; and it presented an accurate description, by metes and bounds, accompanied with a plat of the territory proposed to be annexed. It also gave the proper notice by publication, describing said territory.”

From the foregoing extract from their brief, it will be seen that the appellees frankly concede that the appellant The City of Peru fully complied with all the requirements of the law, for the annexation of all the territory described in its petition. But the board of commissioners of Miami county, to whom said petition was addressed, upon the hearing of said petition, made an order for the annexation to said City of Peru of a part, only, particularly described by metes and bounds, of the territory described in said petition, and denying the prayer of said petition for the annexation of the residue of the territory described therein.

Upon this action of the board of commissioners upon said petition, the questions arise,—and these are the only important questions in this case,—was the said order of annexation, so made by said board, valid, legal and operative? or was said order, so made, absolutely null and void?

The proceedings before the board of commissioners of Miami county, mentioned in appellees' complaint, were begun under and pursuant to the provisions of parts of sections 85 and 86 of the general law of this State for the incorporation of cities, approved March 14th, 1876. We set out so much of each of these sections as can possibly have any connection with said proceedings.

The City of Peru et al. v. Bearss et al.

“Sec. 85. * * * If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and, at the same time, present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days’ notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed.

“Sec. 86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation, and if, after inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book, specifying the territory annexed, with the boundaries of the same, according to the survey, and they shall cause an attested copy of entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this State. * * * * *

The foregoing parts of sections contain all the legislation of this State, on the subject of the annexation to cities, incorporated under the general law for the incorporation of cities, of territory contiguous thereto, where the owner or owners of such territory will not consent to such annexation. All the authority for the institution of such proceedings by such cities is to be found in the said part of said section 85. And all the power conferred on the board of commissioners, to hear and determine such proceedings, is to be found in the said part of said section 86. In other words, the entire proceedings for the annexation of contiguous territory to incorporated

The City of Peru et al. v. Beares et al.

cities are statutory proceedings ; and to make them operative and give them validity, it is essentially necessary that all the proceedings should be in strict conformity with the provisions and requirements of the statute. And this is true, as well in regard to the proceedings and decision of the board of commissioners, as in regard to the preliminary proceedings of the city.

In such a proceeding by a city, for the annexation of contiguous territory, against the consent of the owners, the board of commissioners before which such proceeding is instituted and had, upon the reception of the city's petition and the hearing had thereon, may lawfully do just what section 86, before cited, has authorized and directed said board to do in such cases, and nothing more or different therefrom. From a close examination and analysis of the language used in and cited from said sections 85 and 86, it seems to us that the action of the board of commissioners, provided for in section 86, is entirely dependent upon the action of the city, as provided for in said section 85, and is limited strictly to the granting or denying of the prayer of the city's petition. The board of commissioners is not authorized by law to grant a part, and deny a part, of the city's petition. If the "board is of the opinion that the prayer of the petition should be granted," then it shall make the order for the annexation. If the legislature had intended that the board of commissioners should have the power to grant the prayer of the city's petition, in part, in such manner as to authorize the board to annex to the city such part only of the territory described in the petition, as to the board might seem right and proper, and to deny the prayer of the petition as to the residue of such territory, then the language of the statute would have been very different from what it is now. It seems to us that it was intended to provide, by the legislation we have cited, that city boundaries might be extended, in the mode prescribed, to include contiguous territory, when the common council of the city

The City of Peru et al. v. Beams et al.

and the board of commissioners of the county, with the proper and necessary formalities required by the law, concurred in the proposed extension, but not otherwise. In the case at bar, the action of the board of commissioners upon the petition of The City of Peru, in the annexation of a part only of the territory described therein, was not in harmony with, nor pursuant to, the city's action and petition. It can not be said, with any degree of accuracy, that the board of commissioners granted the prayer of said petition; and it was only upon the granting of the prayer of the petition, that the board was authorized to make any order for the annexation of territory. And the order of the board, in this case, for the annexation to The City of Peru of a part only of the territory described in the city's petition, was wholly unauthorized by law, and was therefore inoperative and void.

In such a proceeding as the one we are considering, the law makes no provision for any appeal from any decision of the board of commissioners, however erroneous it may have been, to any other tribunal. It follows, therefore, that whenever a wrong decision is made by the board, in such a proceeding as this, the parties aggrieved thereby are without any adequate remedy, except such as may be afforded by an action like the one now before us. The property of the appellees, described in their complaint, was not lawfully within the corporate limits of The City of Peru, and therefore was not subject to taxation by said city for municipal purposes. The corporate authorities of said City of Peru had, however, assessed the said property of the appellees for such taxation, and claimed and asserted the right to reassess the same property, for such taxation, for the years succeeding, and to levy and collect the taxes assessed and to be assessed thereon. In their complaint the appellees stated and set forth all the matters of fact we have been considering; and, in our opinion, the facts so stated were sufficient to constitute a cause of action, and to entitle the appellees to the relief prayed

Wilson v. Vance, Adm'r, et al.

for in said complaint. There was no error in the decision of the court below, overruling appellant's demurrer to said complaint.

The judgment of the court below is affirmed, at the costs of the appellants.

WILSON v. VANCE, ADM'R, ET AL.

PLEADING.—Former Adjudication.—Answer.—Copy of Judgment.—To a complaint by the surviving partner, against the estate of his deceased former partner, for settlement of *specified* items of the partnership business, the defendant answered former adjudication, attaching to his answer a transcript of the pleadings, proceedings and judgment in a former action between the same parties, in the common pleas court, and averring that the matters adjudicated in the former action were the same as those alleged in the latter, and had been fully and finally adjudicated by such court.

Held, on demurrer, that such answer is sufficient.

Held, also, that the transcript attached to such answer is not a "written instrument" within the meaning of that term as used in section 78 of the practice act, is no part of such answer, and can not be looked to in determining whether the items set out therein are the same as those specified in the complaint.

APPEAL.—Supreme Court.—Superior Court.—An appeal to the Supreme Court, from the superior court, lies only from judgments or orders of the latter court rendered at general term.

SAME.—Practice.—Petition for Rehearing.—Where the decision of a cause may be placed upon proper grounds, and is right, a mere erroneous reason therefor, assigned in the opinion, is not sufficient ground for a rehearing.

PRACTICE.—Superior Court.—Supreme Court.—Error of the superior court, at special term, must be assigned in such court, at general term, or it can not be considered by the Supreme Court on appeal.

SAME.—Circuit Court.—An alleged erroneous ruling of the circuit court, made during the pendency therein of a cause afterwards transferred by change of venue to the superior court, must be assigned as error, in the latter court, at general term, or it can not be considered by the Supreme Court on appeal.

From the Marion Superior Court.

55	584
130	500
55	584
135	47
55	584
140	161
140	223
55	584
154	448
55	584
158	303
55	584
167	433
167	434

Wilson v. Vance, Adm'r, et al.

J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

S. Claypool, J. L. Mitchell, H. C. Newcomb and W. A. Ketcham, for appellees.

WORDEN, C. J.—This was an action by the appellant, against the appellees.

The complaint consisted of five paragraphs, the first four of which were struck out by the consent of the parties.

The defendants answered the fifth paragraph, and the plaintiff demurred to the seventh paragraph of the answer, for want of sufficient facts, but the demurrer was overruled, and the plaintiff excepted.

The plaintiff declining to reply to the seventh paragraph of the answer, judgment was rendered for the defendants.

The ruling on the demurrer to the seventh paragraph of the answer presents the only question involved here.

The fifth paragraph of the complaint alleged, in substance, that the plaintiff and Lawrence M. Vance, the defendants' decedent, in the years 1852 to 1855, inclusive, were partners in the business of building and constructing the Lawrenceburgh and Upper Mississippi Railroad; that Vance was the book-keeper and cashier of the firm, and, as such cashier, received of the firm assets six hundred thousand dollars, and paid out upon the firm indebtedness two hundred thousand dollars; that for the balance of the firm assets said Vance never accounted to the firm or to the plaintiff, and that the plaintiff never received any of the assets whatever.

That the plaintiff superintended the construction of the work, and depended solely upon Vance for the transaction of the financial business of the firm. That the partnership accounts and transactions were never settled by the parties between themselves, though the plaintiff often demanded of Vance a full settlement thereof, but the latter

Wilson v. Vance, Adm'r, et al.

from time to time deferred the same until his death, in 1863. The firm owed no debts, nor was any thing due the firm, Vance having collected up all its dues. The paragraph sets out a list of assets alleged to have been received by Vance, and charges him with fraud in several respects, and prays for a full and final settlement of the accounts, and for a judgment for one hundred thousand dollars and other proper relief.

The seventh paragraph of the answer was as follows:

"7th. Further answering, the defendants say, that heretofore, to wit, on the 22d day of January, 1864, said plaintiff filed in the office of the clerk of the court of common pleas of Marion county, Indiana, his certain claim or complaint, in writing, against Samuel C. Vance, administrator of the estate of Lawrence M. Vance, deceased, being the same Vance mentioned in the complaint herein, alleging, *inter alia*, that he and said decedent were partners in the lifetime of the latter in the business of constructing a railroad between the town of Lawrenceburgh, in the county of Dearborn, Indiana, and the city of Indianapolis, in the same State, which railroad and partnership business are the identical ones mentioned in the complaint herein, and not other; that said partners had never settled said business, and praying that an account might be taken of said partnership transactions by said court, and that the same might be settled by said court, and asking judgment against said estate in the sum of twenty-five thousand dollars; and such proceedings were had thereunder that afterwards, to wit, on the 7th day of February, 1867, being the fourth judicial day of the February term of said court for the year 1867, said court found in favor of the plaintiff in said cause, and assessed his damages at three thousand and eighty-two dollars and forty cents, and ordered said sum to be paid by said administrator, and rendered judgment therefor; and afterwards said plaintiff appealed therefrom to the Supreme Court of Indiana, and afterwards, to wit, on the 2d

Wilson v. Vance, Adm'r, et al.

day of March, 1871, said judgment was by said court in all things affirmed; and defendant files herewith, and makes part hereof, a complete transcript of all the proceedings had in said cause in the court of common pleas and Supreme Court, and says that the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein; and that said judgment and order were a full and final and complete accounting and settlement of all matters connected with, or in any way referring to, the partnership matters set forth in the complaint filed herein; and they say the plaintiff is thereby estopped from claiming any thing on account of said alleged fraudulent transactions connected with said partnership. Wherefore, on all the facts contained in the foregoing answer, the defendant prays judgment for his costs herein, and for all further relief."

The paragraph of answer, on its face, was clearly good. It alleged that "the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein; and that said judgment and order were a full and final and complete accounting and settlement of all matters connected with, or in any way referring to, the partnership matters set forth in the complaint filed herein." Whether the matters adjudicated in the former action were one and the same with those mentioned in the complaint herein, was a question of fact, and the fact is sufficiently and clearly averred.

But the appellant insists that the transcript of the record of the former action, which was professedly filed with and made a part of the answer, shows that the former action did not embrace all, or indeed any very considerable part, of the matters embraced in the present action, and especially did not embrace the matters of fraud charged in the present action; and he insists that we may look to the transcript thus filed, for the determination of this question.

The latter proposition might be true if the transcript

Wilson v. Vance, Adm'r, et al.

thus filed could be legitimately considered as part of the answer.

The statute provides that "When any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading.

* * * Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record. * * *" 2 R. S. 1876, p. 73, sec. 78.

Thus, whenever a pleading is founded on a written instrument, the copy filed with the pleading, though not copied in the pleading, becomes a part of the pleading, because it becomes a part of the record. But this is not true with reference to papers or documents that are not written instruments within the meaning of the statute, though they may be the foundation of the pleading. The statute makes copies of written instruments a part of the record, when they are the foundation of any pleading, but it does not make copies of other documents, not written instruments, a part of the record, though the pleading may be founded upon such documents.

In *Lytle v. Lytle*, 37 Ind. 281, it was held, that a judgment was not a "written instrument" within the meaning of the statute, and, therefore, that a copy or transcript thereof need not be filed with a pleading founded upon it. This decision has been followed in a number of cases since.

It was not necessary to have filed a transcript of the judgment pleaded, with the answer; and being filed, it did not become a part of the answer, because the judgment was not a written instrument, a copy of which, when filed with a pleading founded thereon, becomes, by the statute, a part of the record. This view is supported by the following cases: *The Excelsior Draining Co. v. Brown*, 38 Ind. 384; *Brooks v. Harris*, 41 Ind. 390; *Knight v. The Flatrock, etc., Turnpike Co.*, 45 Ind. 134; *Trueblood v. Hollingsworth*, 48 Ind. 537.

Except so far as the statute makes written instruments

Wilson v. Vance, Adm'r, et al.

or copies thereof, when filed with the pleading, a part of the record, it is against our entire system of legal procedure to regard copies of documents, constituting evidence in the cause, filed with the pleading, as a part of the pleadings. That would be but pleading the evidence, instead of the facts.

Issues are of two kinds; of law and of fact. "Issues of law must be tried by the court. Issues of fact must be tried by a jury, unless a jury trial is waived." 2 R. S. 1876, p. 164, sec. 320.

On an issue of law raised by a demurrer, the court determines no fact whatever, but determines the law on the facts stated in the pleading to which the demurrer is addressed.

In this case, the defendants filed a valid paragraph of answer, as we have seen, setting up a former adjudication upon the same matters involved in this action. The averments of the paragraph are clearly sufficient. They also filed a transcript of the judgment in the former action.

If the court were to look into the transcript thus filed, to ascertain whether it supported the allegations of the answer, in respect to the identity of the matters involved in the two actions, and were to decide accordingly, it would be deciding a question of fact on demurrer.

If, in point of fact, the two causes of action were different, and not identical, issue might have been taken on the answer, and the question might have been tried as a question of fact, but it could not be determined on demurrer. If documents filed with a pleading can be looked to in order to control the averments of the pleading, and make the pleading invalid, the converse must be true, and such documents or papers may be looked to, in order to help out a defective pleading and supply the lack of necessary averments. Such documents or papers, not written instruments within the meaning of the statute before noticed, though filed with a pleading and professedly made a part thereof, can not, in our opinion, be

Wilson v. Vance, Adm'r, et al.

looked to for the purpose of determining the validity or invalidity of the pleading, which must stand or fall upon its own averments, without reference to the documents accompanying it. How far written instruments or copies thereof, such as the statute makes a part of the record when filed with a pleading, may be looked to for the purpose of controlling the averments of the pleading, or supplying the lack of averments, we do not decide, no such question being involved here.

The court below, at general term, declined to look to the transcript filed with the paragraph of answer, for the purpose of determining its sufficiency, and in this they committed no error.

The judgment below is affirmed, with costs.

ON PETITION FOR A REHEARING.

WORDEN, J.—A petition for rehearing has been filed in this case, which we proceed to consider.

A demurrer was sustained to the first four paragraphs of the complaint, and the plaintiff excepted. In the original opinion we disposed of the questions supposed to arise upon these paragraphs, by saying that they were struck out with the consent of the parties.

In the petition for a rehearing, our attention is called to a subsequent portion of the record, which we had overlooked in the preparation of the original opinion, by which it appears that the order striking out the paragraphs was set aside. This of course left the paragraphs in the record, the same as if they had never been struck out.

But the appellees insist, nevertheless, that no question arises upon those paragraphs, or upon the ruling in sustaining the demurrers thereto, in this court.

This, it will be remembered, is an appeal from the Marion superior court. An appeal lies to this court from orders and judgments rendered by that court at general

Wilson v. Vance, Adm'r, et al.

term, only. 2 R. S. 1876, p. 27, sec. 27. An assignment of error, here, must be based upon the action of the court below at general term; and no question can be considered here, except such as was embraced in the assignment of error on appeal from the special to the general term, below. Buskirk Prae. 128, et seq., and authorities there cited.

The action was originally brought in the Marion court of common pleas, and was taken by change of venue to the Hendricks court of common pleas, from which it seems to have passed into the circuit court of that county, on the dissolution, as we suppose, of the court of common pleas. While the action was pending in the Hendricks circuit court, the demurrers to the four paragraphs were sustained.

Afterwards, by the agreement of the parties, for their convenience and that of the witnesses, the venue was changed to the Marion superior court.

On appeal from the special to the general term the only error assigned was the following:

"The court, in special term, erred in overruling the plaintiff's demurrer to the 7th paragraph of the defendants' answer."

It is thus seen that no question was presented to the court below, at general term, in respect to the ruling on the demurrers to the four paragraphs of the complaint; and hence no question can arise on that ruling in this court.

We see no reason why the Superior court at general term, on appeal to it from special term, may not take cognizance of and rectify all errors committed in the previous progress of a cause, whether committed in that court, or some other court, from which the cause is removed into that court by change of venue, upon such errors being properly assigned.

There is no question before us in respect to the ruling on the demurrers to the four paragraphs of the complaint.

Woody v. Fislar et al.

This grows out of a different reason from that stated in the original opinion; but a wrong reason for a right decision can be no ground for a rehearing, where the decision can be placed upon the proper ground.

We are also asked to reconsider the other questions originally decided, but we are satisfied, upon again looking into the case, with the decision of the other questions involved.

The petition for a rehearing is overruled.

Original opinion filed at November Term, 1876, and that on petition for rehearing, at May Term, 1877.

WOODY v. FISLAR ET AL.

VENDOR AND PURCHASER.—Vendor's Lien.—Innocent Purchaser.—A. conveyed certain land to B., receiving for an unpaid part of the purchase-money the promissory note of the latter; B. in like manner conveyed such land to C., receiving his promissory note for an unpaid amount of the purchase-money, equal to that due from B. to A.; B. having, for a valuable consideration, transferred C.'s note to D., the latter, while still having an opportunity of returning such note to B., if subject to any defence, called upon C., who informed him that his note was valid and would be paid; and B. having become insolvent, A., whilst both such notes remained unpaid, brought suit against B., C. and D., to enforce a lien against such land, for his unpaid purchase-money, of which C. and D. had had no notice, prior to the transfer of C.'s note to D.

Held, that A. is not entitled to such lien.

From the Jackson Circuit Court.

D. H. Long and *B. E. Long*, for appellant.

F. Emerson, *B. H. Burrell* and *W. K. Marshall*, for appellees.

WORDEN, J.—Action by the appellant, against the appellees, to enforce a vendor's lien upon certain real estate.

Woody v. Fislar *et al.*

Such proceedings were had as that judgment was rendered against the plaintiff, who appeals to this court.

Without taking up space in stating how the facts were presented, we may state that the following are the material facts of the case, as shown by the record.

“The plaintiff, Woody, sold and conveyed certain land to Beem, a part of the purchase-money for which was left unpaid, for which Beem executed to Woody his promissory note. Beem afterwards sold and conveyed the land to Fislar, the latter paying a part of the purchase-money, and executing to Beem two promissory notes for the residue. The notes thus executed by Fislar to Beem were sufficient in amount to pay the remaining purchase-money due from Beem to Woody, for which Beem had executed to Woody his note, as before stated. Afterwards, Beem, for a valuable consideration, transferred the notes thus executed to him by Fislar, to Smith. Smith, after he had thus taken the notes from Beem, and while he had an opportunity of returning them to Beem if they were not all right, saw Fislar, and made inquiry of him about the notes, and the latter informed him that they were all right and would be paid as soon as due, and Smith retained them. Up to this time neither Fislar nor Smith had any notice whatever that Beem had not fully paid Woody for the land, or that the latter had, or claimed to have, any lien upon it for purchase-money. Woody some time afterwards notified Fislar of his supposed lien upon the land for the unpaid purchase-money, intimating to him that he should retain enough of the purchase-money due from him to Beem to meet the plaintiff's claim. Beem is insolvent, and has removed from the State.”

These are the essential facts in the case, as gathered from a confused record, in respect to which there is, we believe, no dispute; and the question arises, whether upon them the plaintiff, Woody, is entitled to a lien upon the land for the unpaid purchase-money due him from Beem.

Woody v. Fislar et al.

Upon as careful a consideration as we have been able to bestow upon the case, we have come to the conclusion that he is not entitled to the lien.

The right which a vendor has to a lien upon land sold and conveyed by him, for the purchase-money, is but an equitable right, and one which ought not to exist or be enforced when it would work wrong and injustice. It was said by MARSHALL, C. J., in the case of *Bayley v. Greenleaf*, 7 Wheat. 46 :

“It is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien.”

If the lien can be enforced against the land, then the amount of it must necessarily be lost by either Fislar or Smith, inasmuch as Beem is insolvent. If Fislar could not make defence to the notes given by him to Beem, thus transferred to Smith, then he would have to pay off the the plaintiff's claim, as well as the notes given to Beem and held by Smith. This would be so manifestly unjust, that the statement of the proposition carries with it its own condemnation.

The injustice of thus compelling Fislar to pay twice is not palliated by the fact that he made such statements to Smith, in reference to the notes, as would estop him to set up any defence to them in the hands of Smith, if the statements made by him would thus estop him.

At the time Smith applied to him for information concerning the notes, Fislar had no knowledge whatever of the plaintiff's supposed claim, and was guilty of no wrong

Woody v. Fislar & al.

or negligence in informing him that the notes were all right and would be paid. The *laches*, if there were any, were on the part of the plaintiff, in not sooner giving notice of his claim. On the other hand, if Fislar would make defence to the notes in the hands of Smith, the enforcement of the supposed lien would not injure him. But this would be doing gross injustice to Smith. Smith purchased the notes in good faith, for value, and retained them after having exercised the caution and prudence of making inquiry of Fislar concerning them, and learning from him that they were all right. To deprive him of the avails of the notes purchased under these circumstances, in order to meet a lien of which neither he nor Fislar had any notice at the time of the transaction, would be inequitable and unjust.

This view is fully sustained by the case of *Moore v. Holcombe*, 3 Leigh, 597. There, Hancock had sold land to Moore, a part of the purchase-money remaining unpaid. Moore sold the land to Franklin, and took Franklin's bonds for the purchase-money. Moore assigned Franklin's bonds to Murrell & Meem, for a valuable consideration. At the time of Franklin's purchase he had no notice of any debt due from Moore to Hancock. It was held, that Hancock could not enforce any lien upon the land for his purchase-money. TUCKER, P., in delivering his opinion said: "Where the vendee of land still retains the estate it is clearly liable for the whole of the unpaid purchase-money by virtue of the vendor's lien. Where he has sold to a sub-vendee, and the title has been made by him, and the money paid before notice of the original vendor's lien, the sub-vendee holds discharged of that lien. Where, however, a part of the purchase-money is unpaid by the sub-vendee, the land in his hands is liable for that unpaid portion, but for no more. The equity is, that he shall pay to the original vendor whatever he himself yet owes to his own vendor. If he owes any thing, he, and his land, are discharged, upon his paying up that to the orig-

Meyers et al. v. Brown et al.

inal vendor's demand; and if he owes nothing, neither himself nor his land is in any wise responsible.

"Try this case by these principles. Was any thing due from Franklin to Moore (when he received notice of Hancock's claim) which equity demanded that he should pay over to Hancock instead of Moore? Nothing was due. His bonds, indeed, had been due to Moore, but Moore had sold them, for value, to persons who knew nothing of the vendor's pretensions. From the moment of that sale, Franklin ceased to owe Moore any thing. He became the debtor of the assignees; and as he owed Moore nothing, he could be liable to Hancock for nothing, as has been already shewn.

"It is true that assignees take every bond subject to the obligor's equity against the obligee; but I have yet to learn, that they take subject to an unknown equity of a stranger against the obligee."

The judgment below is affirmed, with costs.



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MEYERS ET AL. v. BROWN ET AL.

HIGHWAY.—*Petition.*—*Names.*—The petition for the location of a highway should not be dismissed because it sets out, generally, and in the alternative, "the names of the owners, agents or occupants of the lands through which such proposed highway will pass," without specifying in which of such relations, to any of the tracts of land therein described, any of such persons stand.

From the Pike Circuit Court.

G. G. Reily and *E. A. Ely*, for appellants.

J. C. Denny and *C. S. Denny*, for appellees.

NIBLACK, J.—James W. Brown and thirty-one other persons, representing themselves to be freeholders of Pike county, filed with the board of commissioners of

that county, at their June term, 1873, a petition praying for the location and establishment of a highway through a portion of said county, and setting forth the beginning, course and termination of the proposed highway; and that "The names of the owners, agents or occupants of the lands through which such proposed highway will pass, being [are] as follows, to wit: Jesse L. Thomas, Sarah Schell, William Bell, James Willis, Clementine Traylor, William Abbott, James Totten, Minerva Abbott, Matilda Abbott, Margaret Meyers, William Hughes, Isham Scraper, James Brown, Robert Davidson, Nathaniel Flint, James Griffith, Roxana Griffith, James Brett, George Scraper, Marion McCormick, Francis M. Griffith, [and] Catharine Flint."

When the petition was taken up for consideration by the board, a motion to dismiss it was entered, because, as was insisted, it did not state sufficiently the names of the owners, occupants and agents of the lands through which said proposed highway was to run. That motion was overruled, and viewers were thereupon appointed, who, at the next term, reported that they had laid out and marked the proposed highway on the route indicated in the petition, and that the same would be of public utility.

Following immediately upon the report of the viewers, the appellants, Charles Meyers and Sarah Schell, with twelve or thirteen others of the immediate neighborhood, filed a remonstrance against the location of the proposed highway. Such proceedings were afterwards had by the board of commissioners, as resulted in the establishment of said highway, as prayed for in the petition.

The said Charles Meyers and Sarah Schell then appealed to the Pike circuit court.

In that court they moved to dismiss the proceedings, because of the alleged insufficiency of the petition; urging, with others, the same objection to it as was insisted upon before the board of commissioners, but the motion was overruled, to which exceptions were reserved.

Meyers et al. v. Brown et al.

A jury, to which the cause was then submitted for trial, returned a verdict that the proposed highway, if established, would be of public utility.

The court thereupon, over a motion for a *venire de novo*, a motion for a new trial and a motion in arrest of judgment, which were each successively made and overruled, entered a judgment establishing the said highway, and against the appellants for costs.

The first error assigned here is based on the refusal of the circuit court to dismiss the proceedings, on account of the alleged insufficiency of the petition.

The first objection urged to the petition, that the record made it appear to have been signed by "James W. Brown and others," only, has been obviated by the filing of an amended record, showing it to have been signed by thirty-two persons, representing themselves to be freeholders of the proper county.

The next and only other objection urged to the petition by the appellants, in their brief, is, that the names of the persons interested in the lands through which the proposed highway was to pass, were not properly given, that is, it is not stated whether the persons named were all owners, all occupants or all agents only, or if all were not of the same class, then who were owners, who were occupants and who were agents.

It would perhaps have been more in accord with the strict rules of pleading, if the petition had indicated in some way what relation each one of the persons referred to sustained to the lands to be affected by the proposed highway, but we cannot hold that it was materially defective for not having done so.

We think it very apparent that the object aimed at, in requiring the names of persons interested in the lands through which it was expected the highway should pass, to be set out in the petition, was to indicate to whom notice should be given of the intended presentation of such petition, so as to afford those persons an opportunity

Hart v. The State.

of appearing to and resisting the petition, if they should desire to do so.

We consider the essential requisite to be, that all persons interested in such lands, whether as owners, occupants or agents, shall be named in the petition, so that they may be notified of its presentation; and we think it sufficient to allege, in the alternative, that such persons are owners, occupants or agents. In our opinion, the court did not err in refusing to dismiss the proceedings, on account of the alleged insufficiency of the petition.

Other rulings of the circuit court have also been assigned for error here, but they are not insisted upon or discussed by the appellants, in their brief. We are therefore not required to consider them.

The judgment is affirmed, at the costs of the appellants.

HART v. THE STATE.

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CRIMINAL LAW.—Larceny.—Indictment.—Description of Stolen Property.—An indictment charging the defendant with having unlawfully and feloniously stolen, taken and carried away “bank-bills” of a certain denomination, “a more particular description of which bank-bills can not now be given,” of a certain value specified, and the property of a person named, is sufficient on motion to quash.

SAME.—Evidence.—On the trial of the defendant upon such indictment, a conviction upon evidence describing the property simply as “bills” is erroneous.

SAME.—Judicial Notice.—The courts of this State take judicial notice of the fact that there are classes of notes and bills, other than bank-bills, in circulation as money.

From the Clinton Circuit Court.

J. M. Gorman, for appellant.

H. C. Wills, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution, founded on an indictment for grand larceny.

Hart v. The State.

The indictment charges that Joseph Hart, on the 20th day of February, A. D. 1877, at the county of Clinton and State of Indiana, "did then and there unlawfully and feloniously steal, take and carry away two bank-bills, of the denomination of twenty dollars each, a more particular description of which said twenty-dollar bank-bills can not now be given; said two twenty-dollar bank-bills being then and there of the value of twenty dollars each, and said two twenty-dollar bank-bills being then and there of the aggregate value of forty dollars: and one bank-bill of the denomination of ten dollars, a more particular description of which said ten-dollar bank-bill can not now be given; and said ten-dollar bank-bill being then and there of the value of ten dollars, and all of said two twenty-dollar bank-bills and said ten-dollar bank-bill being then and there of the aggregate value of fifty dollars, and said two twenty-dollar bank-bills and said ten-dollar bank-bill being then and there the personal property and chattels of Jesse S. Davis."

The defendant moved to quash the indictment, but the motion was overruled.

There was then an arraignment, a plea of not guilty, a trial by a jury, followed by a verdict of guilty. Motions for a new trial and in arrest of judgment were then each successively made and overruled, and judgment was rendered on the verdict.

Errors are assigned here:

1st. On the overruling of the motion to quash the indictment;

2d. On the overruling of the motion for a new trial; and,

3d. On the overruling of the motion in arrest of judgment.

It is objected that the indictment in this case is substantially defective for want of a more specific description of the bank-bills charged to have been stolen. The case of *Arnold v. The State*, 52 Ind. 281, is cited in support of

Hart v. The State.

that position. As we construe that case, however, it tends rather to sustain the sufficiency of the indictment. The conclusion we draw from it is, that in an indictment for larceny of bank-bills it is sufficient to charge their number,—that is, how many—their denomination and their value. That seems to have been sufficiently done in the case at bar. See, also, 1 Greenl. Ev., sec. 65. We think the objection to the indictment is not well taken, and that the court did not err in overruling the motion to quash it.

One of the causes assigned for a new trial was, that the verdict of the jury was not sustained by sufficient evidence.

On the trial, Davis, the injured party, was the principal, and the only material, witness for the State. After detailing the circumstances under which he lost his money, he said “There were two twenty-dollar bills and a ten-dollar bill taken from me. Hart got the money. It was of the value of fifty dollars; the twenty-dollar bills were worth twenty dollars each, and the ten-dollar bill was worth ten dollars.” That was the only description Davis gave of the money.

The defendant and his witnesses referred to the money in the same general way, and none of them spoke of it as consisting of bank-bills.

We understand the rule to be, in cases like the one before us, that the evidence on the trial must be sufficient to enable the jury to say, whether the property proved to have been stolen is the same with that on which the indictment is founded.

The indictment in this case having charged that the money stolen consisted of bank-bills, it was incumbent on the State to prove that the bills, or some portion of them, were bank-bills. See, again, 1 Greenl. Ev., sec. 65, above cited.

If there were no other bills in circulation than bank-bills, then, perhaps, the jury might have inferred from the

Hart v. The State.

testimony, that the bills referred to were bank-bills; but we must take judicial notice of the fact that there are other classes of notes and bills in circulation as money, and, hence, no inference can be properly drawn as to what class the bills belonged. *Rex v. Craven*, Rus. & Ry. 14; *Regina v. Bond*, 1 Den. C. C. 517.

We are of the opinion, that the failure to show that the bills alleged to have been stolen were bank-bills was a material omission, and that, in consequence, the verdict of the jury was not sustained by the evidence. The judgment will have to be reversed.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will issue the proper notice to the warden of the northern state-prison.

INDEX.

ABATEMENT OF ACTION.

See PROMISSORY NOTE, 10.

ACTIONS.

See PARTITION, 1; REPLEVIN, 3.

ADMISSIONS.

See EVIDENCE, 5, 10.

ADULTERY.

See DESCENTS.

ADVERSE POSSESSION.

See WATERCOURSE.

AFFIDAVIT.

See NEW TRIAL, 12; PROMISSORY NOTE, 17.

ALTERATION.

See FRAUD, 5; PROMISSORY NOTE, 16.

AMENDMENT.

See ARREST OF JUDGMENT; HIGHWAY, 1, 2; MECHANIC'S LIEN, 6; PRACTICE, 11; REDEMPTION, 1; TURNPIKE, 4.

APPEAL.

See CITIES AND TOWNS, 16; COUNTY COMMISSIONERS, 3; HIGHWAY, 4; JUDGMENT, 2; LIQUOR LAW, 6; PRACTICE, 4; SUPREME COURT, 1, 2, 5, 9, 18, 20, 23, 44.

Where a cause of action accrues under one statute, and the right of appeal to the Supreme Court from a judgment therein rendered lies under another, even the unqualified repeal of the former statute does not deprive the defendant of such right of appeal. *Backes v. Dant*, 181

APPRAISEMENT.

See FIXTURE, 3, 4; JUDGMENT, 1.

ARREST OF JUDGMENT.

See HIGHWAYS, 6; MECHANIC'S LIEN, 3; PLEADING, 7; SLANDER, 5.

Practice.—The filing of an amended complaint in a cause, after a motion in arrest of judgment has been sustained, does not bring the defendant back into court, as such arrest puts an end to the cause.

Crawford et al. v. Crockett et al., 220

ASSESSMENT OF DAMAGES.

See HIGHWAY, 11.

ASSESSMENT OF TAXES.

See CITIES AND TOWNS, 14, 17; CONTRACT, 8; TAXES.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See SUPREME COURT, 1, 2.

ASSIGNMENT OF ERROR.

See PRACTICE, 4; SUPREME COURT, 7, 12, 13, 23, 25.

ATTORNEY.

See CONTINUANCE, 1; EVIDENCE, 5; PLEADING, 9.

ATTORNEY GENERAL.

See COUNTY CLERK, 4; DECEDENTS' ESTATES, 4, 5, 6.

Repeal of Statutes.—Auditor of State.—County Superintendent.—Section 9 of the supplemental act of March 10th, 1873, (1 R. S. 1876, p. 151) in relation to the election, duties, etc., of the Attorney General, is in conflict with and repeals so much of clauses 6 and 7 of section 2 of the act of May 27th, 1852, (1 R. S. 1876, p. 156) prescribing the powers and duties of the Auditor of State, and so much of section 7 of the supplemental act of March 8th, 1873, (1 R. S. 1876, p. 816) as authorize, respectively, the Auditor of State and county superintendents to institute suits for the collection of unclaimed witness, court and docket fees, fines, forfeitures and moneys of estates.

Moore, Adm'r, v. The State, ex rel. Denny, Att'y Gen'l, 360

AUDITOR OF STATE.

See ATTORNEY GENERAL.

BAILOR AND BAILEE.

See CONVERSION.

BANKRUPTCY.

1. *Discharge of Bankrupt.—Contribution.—Injunction.*—Where a judgment has been rendered upon a promissory note, against the principal maker thereof, and his sureties, as such, and, subsequent to the payment of such judgment, by one of such sureties, the other is adjudged and discharged as a bankrupt, in a proceeding in a district court of the United States, the claim of such paying surety, upon the bankrupt surety, for contribution, is not one exempted by the bankrupt law of the United States from, but is included in, the operation of such discharge; and such paying surety and an officer holding an execution on such judgment, for the benefit of such paying surety, may be enjoined from selling the property of such bankrupt, on such execution.

Hays v. Ford et al., 52

2. *Tort.*—A judgment for damages for a tort, rendered against a person, prior to the commencement of proceedings against him, wherein he is finally discharged as a bankrupt, is embraced in such discharge. *Ib.*
3. *Trespass.—Officer.*—Where, upon a judgment rendered against a duly discharged bankrupt before such discharge, the creditor subsequently causes a writ to be issued to, and the goods of such bankrupt seized thereon by, the proper officer, the creditor is liable to such bankrupt, *ab initio*, as a trespasser, whether he knew of the discharge of such bankrupt or not; but such officer will be protected by such writ, if it be regular upon its face. *Ib.*

4. *Pleading.—Evidence.*—Where, to avoid the payment of a debt due from him to another before his discharge as a bankrupt, the latter undertakes to avail himself of such discharge, it is only necessary for him to plead such discharge by a general averment thereof; and a certified copy of the judgment of the court decreeing such discharge, under the hand of the judge thereof, and authenticated by its seal, is conclusive evidence thereof. *Ib.*

BASTARDY.

See VENUE, CHANGE OF.

BILL OF EXCEPTIONS.

See CONTINUANCE, 3; SUPREME COURT, 11, 21, 24, 29, 39.

Filing.—Unless, upon appeal to the Supreme Court, the record shows that the bill of exceptions was filed in time, it constitutes no part of the record. *Posey v. Scales et al.*, 282

BRIDGE.

See COUNTY COMMISSIONERS, 2, 3, 4, 5.

BURDEN OF PROOF.

See CRIMINAL LAW, 4; HIGHWAYS, 10.

CASES OVERRULED.

Liquor License.—The cases of *The Town of Princeton v. Vierling*, 40 Ind. 340, and *The Town of Ligonier v. Ackerman*, 46 Ind. 552.

The Town of Brazil v. Kress, 14

Damages.—*Colburn v. The State, ex rel., etc.*, 47 Ind. 310.

Richardson, Adm'r, et al. v. The State, ex rel. Crow, etc., 381

CITIES AND TOWNS.

See PAYMENT, 1; REAL ESTATE, ACTION TO QUIET TITLE, 8; TAXES.

1. *Parties.—Summons.*—An action against a city, to recover for the value of services rendered by the plaintiff for the defendant, in the erection of school buildings by the latter, can not be maintained against such city in her ordinary municipal capacity, but must be brought against her as "The School City of ———," and the summons served upon her school trustees. *The City of Huntington v. Day*, 7
2. *Pleading.—Presumption.*—In an action against a town, the contrary not appearing by the complaint or otherwise, it will be presumed that such defendant was incorporated under the general law of this State for the incorporation of towns. *The Town of Brazil v. Kress*, 14
3. *Same.*—In an action wherein a city of this State is a party, it will be presumed, unless the contrary is alleged, that it is organized under the general law of this State for the incorporation of cities. *Hilgenberg v. Wilson, Treasurer*, 210
4. *Death Caused by Negligence.—Pleading.—Statute Construed.—Presumption.—Evidence.—Wabash and Erie Canal.*—In an action against a city, by the administrator of a decedent, to recover damages for his death, resulting from an injury alleged to have been caused by the negligence of the defendant, the complaint alleged, that at a point in such city, where a public street thereof crossed the Wabash and Erie Canal, she had negligently permitted a bridge across such canal to become and remain so out of repair, for a period of two months prior to and until decedent's death, that it could not be travelled upon, of which defendant's agents had notice; that she had also permitted such street to be so used upon both sides of such canal, upon one side of such bridge, as to present the appearance of a fording place used by the travelling public; but that in fact, owing to excavations in the bed of the canal,

concealed beneath the water thereof, such place was not and could not be used as a ford; that such decedent, not knowing of the danger and deceived by such appearances, in travelling upon such street and intending to cross such canal, drove his horse, attached to the buggy in which he was seated, down such apparent fording place, into such canal, where, "without fault upon his part," by means of such excavations, he received the injury which caused his death.

Held, upon demurrer, that the complaint is sufficient.

Held, also, that in the absence of any allegation to the contrary, such city is presumed to have been incorporated under the general law of this State for the incorporation of cities.

Held, also, that the complaint shows that the decedent was injured at a point upon a public street of such city, and within her limits.

Held, also, that under the 61st section of the act of March 14th, 1867, providing for the incorporation of cities, etc., (1 R. S. 1876, p. 300) such city is bound to keep in repair such bridge across such canal.

Held, also, that the act of January 27th, 1847, in relation to the Wabash and Erie canal, (Acts 1847, p. 33) does not authorize nor bind the trustees thereof to keep in repair any bridge across such canal, upon any public street within the limits of a city.

Held, also, that under the allegations of such complaint, the plaintiff could introduce evidence that such decedent had been guilty of no contributory negligence. *Lowrey, Adm'r'x, v. The City of Delphi*, 250

5. *Negligence*.—A city having so graded and filled one of her public streets, as to level it with, and include as part thereof, the top of a high wall, erected by the owners of adjoining real estate, and having negligently allowed such street to be used by the travelling public, without having erected guards or railings to prevent accidental driving or falling over such wall, a traveller, having no knowledge of such wall, without fault upon his part, fell over such embankment, thereby receiving injuries for which he brought suit against such city.

Held, that though such wall was erected upon private property, the city having adopted and used it as a part of such street is liable.

Held, also, the jury having specially found that at the time of receiving the injury he had no knowledge of the condition of such street, that the judgment should not be disturbed because there was evidence that he had had such knowledge, years previous thereto.

The City of Aurora v. Colshire, 484

6. *Constitutional Law*.—*Annexing Contiguous Lands*.—The act of March 14th, 1867, providing "for the incorporation of cities," etc., in so far as it authorizes a board of commissioners, on the petition of the common council of a city, to annex to such city territory contiguous thereto, is constitutional. *Stilz et al. v. The City of Indianapolis et al.*, 515

7. *Same*.—*Eminent Domain*.—The authority conferred by such act, upon a county board, to so annex to a city territory contiguous thereto, is not founded upon the right of eminent domain. *Ib.*

8. *Same*.—*Common Law*.—The power of the proper authority to alter the boundaries of a civil corporation, or annex thereto contiguous territory, existed at common law, but in this State is statutory. *Ib.*

9. *Same*.—*Petition*.—*Signatures*.—The petition to the county board, by the mayor and common council of a city, asking for the annexation to such city of contiguous territory, need not be signed unanimously by the members of such council; the signatures thereto of a number of such members exceeding two-thirds being sufficient. *Ib.*

10. *Same*.—*Description of Territory*.—Where the contiguous territory, which it is desired to annex to a city, is described in the petition by the divisions formed by the congressional surveys, and by subdivisions thereof capable of being ascertained, such description is sufficient. *Ib.*

11. *Same.—Plat.*—The plat of the lands proposed to be annexed to a city need not be filed at the time such petition is filed, but may be filed thereafter at any time before the county board has finally acted upon such petition, even over the objection of a remonstrant. *Ib.*
12. *Same —Filing Petition.—Notice.*—The statute authorizing such petition does not require that it shall be filed any specified period prior to the first day of the session of the county board at which it is intended to present it, but thirty days' notice of such intention must be given. *Ib.*
13. *Same.—Survey.*—If such petition contain a specific description of the premises asked to be annexed, and the plat filed therewith contain a copy of an actual established survey thereof, a survey for the purposes of such petition is unnecessary. *Ib.*
14. *Same.—Injunction.*—The power of a city to tax, for her municipal purposes, a tract of farm or garden land contiguous to such city, can not be called in question in an action by the owner thereof, against such city and a county board, to enjoin them from executing an order of such board, annexing such land to such city. *Ib.*
15. *Same.—County Board.—Power of.—Statute Construed.*—Where, under the provisions of sections 85 and 86 (1 R. S. 1876, p. 311) of the act of March 14th, 1867, providing "for the incorporation of cities," etc., the common council of a city has filed its petition with the proper county board, asking that certain described lands, not platted, lying contiguous to such city, be annexed thereto, to which it is averred that the owner will not consent, such board has no power to order the annexation of a part, only, of such lands, but must grant or refuse the prayer of such petition as a whole. *The City of Peru et al. v. Bearss et al., 576*
16. *Partial Annexation Void.—Appeal.*—An order of such county board, annexing to such city part, only, of such lands, is inoperative and void, but is one from which no appeal is authorized by law. *Ib.*
17. *Tax.—Injunction.*—Where a city has assessed a tax for municipal purposes upon lands so annexed, its collection may be enjoined and such assessment cancelled, in an action therefor by the owner. *Ib.*

COLLATERAL WARRANTY.

See COVENANT.

COMMON SCHOOLS.

See ATTORNEY GENERAL; CITIES AND TOWNS, 1; COUNTY COMMISSIONERS, 11.

CONFESSION AND AVOIDANCE.

See PROMISSORY NOTE, 3.

CONSTITUTIONAL LAW.

See CITIES AND TOWNS, 6; HIGHWAY, 10; SLANDER, 7.

CONTINUANCE.

See PROMISSORY NOTE, 17.

1. *Witness.—Attorney.*—The absence of a witness in a cause, or of an attorney regularly employed to conduct such cause, without the fault of the applicant, is, upon filing a sufficient affidavit, good cause for a continuance. *Bartel v. Tieman et al., 438*
2. *Supreme Court.*—The action of the circuit court, in refusing to grant a continuance of a cause, is subject to review by the Supreme Court, on appeal. *Ib.*
3. *Same.—Bill of Exceptions.*—If the action of a court, in refusing to grant a continuance of a cause, has been influenced by facts outside of those stated in the affidavit therefor, they must, to be made avail-

able to sustain such decision on appeal to the Supreme Court, be set out in the bill of exceptions. *Ib.*

CONTRACT.

See DAMAGES, 1; INFANT, 1; LANDLORD AND TENANT, 6, 7; MORTGAGE, 1, 2; PLEADING, 2; PROMISSORY NOTE, 7; REDEMPTION, 1; STATUTE OF FRAUDS.

1. *Payment.—Money Paid for Use.—Evidence.*—In a suit to recover for money alleged to have been paid by the plaintiff to a third person, for and at the request of the defendant, it is immaterial as to whether such third person had or had not a valid claim upon the defendant, for such or any sum of money. But to recover therefor the plaintiff must establish the facts that he had made such payment, and that it was made on the authority of the defendant. *Lucas v. Jarrell, Ex'r*, 41
2. *Evidence.—Performance.*—Where A. subscribes a certain sum of money, for a certain purpose, to be paid, on a certain condition, to B., who is to procure therewith a certain writing for A.; and B., without the express request of A., advances such sum, and procures such writing for A., and then institutes suit for such sum against A., the latter may introduce evidence that such condition has never been performed; but, in the absence of proof of such request, or proof of the performance of such condition, B. can not introduce such writing in evidence. *Ib.*
3. *Replevin.—Sale.—Rescission.—Fraud.*—In an action by the vendor against the vendee, to rescind a contract of sale of personal property, and to recover possession thereof, on account of alleged false and fraudulent representations as to his solvency, made by the latter to the former, to induce him to part with such property on the credit of the vendee, the plaintiff must establish the facts that the alleged representations were made by the vendee; that at the time they were made, they were false, and that the vendee knew them to be false; that they were such as would deceive a prudent man; that they were believed by the vendor; and that they induced him to part with such property. *Gregory v. Schoenell*, 101
4. *Same.*—Where the vendor of personal property is induced to part with his property on the credit of the vendee, not on account of false and fraudulent representations made to him by the vendee, but on account of confidence in the vendee, acquired in prior dealings between such parties, such sale is valid and cannot be rescinded, nor such property recovered back, by such vendor, on account of fraud. *Ib.*
5. *Ratification.*—Where, on account of fraud practised by the vendee, a sale of personal property might have been rescinded and possession of the property recovered by the vendor, but the latter, with full knowledge of such fraud, accepts security for the payment of the purchase price of such property and allow such vendee to retain the possession thereof, until it is levied upon by an officer holding a writ against the property of such vendee, the vendor will be deemed to have acquiesced in and ratified such sale. *Ib.*
6. *Same.*—Property of the value of several hundred dollars, which had been levied upon by, and was in the possession of, an officer, under a writ against the property of the owner thereof, was, whilst so held, sold by him to a third person, for the sum of one dollar, but possession thereof was not and could not be given, by such owner, to such purchaser; and the latter thereupon brought suit against the former, to recover the possession of such property. *Held*, that such sale was invalid, and such action could not be maintained. *Ib.*
7. *Option.—Notice.—Pleading.*—By the terms of a written contract, one party thereto bound himself to deliver to the other a specified amount

of a certain kind of chattels, at a place therein designated, "at the option of the" latter "at any time" during a specified period.

Held, in a suit by the former, against the latter, for a breach of such contract, that it was the duty of the latter to have notified the former as to what time during such period such delivery should be made.

Held, also, that it is sufficient for the former to aver in his complaint, that during all of such period, he had had the amount and kind of chattels agreed upon, in his possession, ready for delivery, but that though the latter had notice thereof, he never notified the former to deliver the same, whereupon, after the expiration of such period, he sold the same to a third person, to his damage. *Posey v. Scales et al.*, 282

8. *Assessment of Taxes.—Fraud.*—To the complaint in an action upon a written instrument executed by the defendants, acknowledging the receipt from, and promising to return to, the plaintiff a certain sum in United States seven-thirty bonds, the defendants answered, admitting the execution of such instrument, but averring, that at the date thereof, the plaintiff had had on deposit, in a bank of which the defendants were officers, a sum in currency equal to the amount mentioned in such receipt; that, in order to fraudulently avoid taxation on such currency, the plaintiff surrendered his certificate, evidencing such deposit, and, in lieu thereof, received the instrument in suit, though no such bonds were ever received as therein recited.

Held, on demurrer, that such answer is insufficient.

Held, also, that an intent to so avoid taxation is not fraudulent.

Stikvoll, Adm'r'r, et al. v. Corwin, Adm'r, 433

9. *Agreement to Maintain.—Rescission.—Fraud.—Real Estate, Action to Recover.*—A complaint to recover a tract of land alleged that it had been conveyed by the plaintiff, to the defendant, in consideration of a written agreement executed by the latter, binding him to comfortably maintain the former during life, in a home on such land; that the defendant, taking advantage of the old age and infirmities of the plaintiff, had defrauded him by causing a penalty, in an amount much less than the value of the land, to be inserted in such agreement, without the knowledge of the plaintiff, and by then failing and refusing to provide such maintenance, whereby the plaintiff was left without a home or means to subsist. Upon the trial, the jury found, generally, for the plaintiff, and, specially, that such contract had been honestly entered into, that the defendant had always been able and willing to maintain the plaintiff, and that he had furnished such maintenance until the plaintiff had voluntarily left, and declined to return to, the defendant's house.

Held, that the defendant was only bound to furnish such maintenance to the plaintiff at his home on such land;

Held, also, that, no demand having been made therefor in the complaint, the plaintiff is not entitled to have such contract reformed by increasing the penalty of such bond; and,

Held, that mental feebleness, not amounting to an absolute incapacity to contract, is not sufficient to justify a rescission of a contract honestly entered into; and, therefore,

Held, that the defendant is entitled to a judgment in his favor, upon the answers to interrogatories, notwithstanding the general verdict.

Graham v. Castor, 559

CONTRIBUTION.

See BANKRUPTCY, 1; STATUTE OF LIMITATIONS, 2.

CONVERSION.

See GUARDIAN AND WARD, 1, 2, 4; PLEADING, 9.

Bailee.—Promissory Note.—A., being indebted to B. in a certain sum, delivered to the latter, as security for the payment of such debt, a promissory note secured by a chattel mortgage, held by A. against C., for a sum exceeding the amount of such debt; C., with knowledge of the nature of B.'s title to such note, having paid him thereon a sum equal to such debt, the latter surrendered such note and released such mortgage to C., who destroyed them, whereupon A. brought suit against both for conversion.

Held, that B. and C. had unlawfully converted such instruments, and are jointly liable therefor to A. *Stephenson v. Feezer et al.*, 416

CONVEYANCE.

See CONTRACT, 9; EVIDENCE, 8; FRAUD; REAL ESTATE, ACTION TO QUIET TITLE, 2, 3; REAL ESTATE, ACTION TO RECOVER; REAL ESTATE, ALIENATION OF, 1, 2, STATUTE OF FRAUDS, 1; STATUTE OF LIMITATIONS.

1. *Warranty by Separate Instrument.*—Where, in addition to his deed conveying real estate, the grantor also executes to the grantee a separate instrument, agreeing therein, that if the realty so conveyed is not worth a sum equal to the consideration expressed in such deed, he "will make it worth" such sum, such instrument constitutes, not a guaranty, but a warranty of such value. *Whitehall v. Conner*, 354
2. *Breach.*—If such instrument be executed upon the same consideration as such deed, the grantor will be liable for a breach thereof. *Ib.*
3. *Evidence.—Practice.*—Upon the trial of an action upon such warranty, for a breach thereof, where the defence relied upon is, that it was executed without consideration, after the completion of such sale and not as part of the transaction, and the defendant so testifies, the plaintiff may then introduce evidence of declarations of the defendant, made to the plaintiff prior to such sale, as to the value of the land conveyed by him, and of his intention to execute such warranty. *Ib.*

COSTS.

See PRACTICE, 11, 12; SUPREME COURT, 19; USURY, 1.

1. *When Judgment Should Carry.*—Where the plaintiff, in an action for a money demand on a contract, recovers a judgment against the defendant, for a sum exceeding fifty dollars, exclusive of costs, he is also entitled to judgment for costs. *Stow v. Graham et al.*, 10
2. *Remittitur.—Supreme Court.—Practice.*—Where, on appeal to the Supreme Court, it appears from the evidence that a portion of the damages assessed against the appellant is excessive, and the remainder just, upon a remittitur by the appellee of such excess, the remainder, with costs accrued before the appeal, will be affirmed, but the costs of the appeal will be adjudged against the appellee. *Pate v. Roberts*, 277
3. *Same.*—Where a recovery has been had for an excessive sum as damages, and on appeal to the Supreme Court, a remittitur of the excess is entered, such judgment, as to the residue, will be affirmed, but at the costs of the appellee made by the appeal. *Cravens et al. v. Duncan*, 347

COUNTY CLERK.

See ATTORNEY GENERAL; DEPOSITION, 3, 4, 5.

1. *Officer.—Public Funds.—Demand.*—Where by law it is made the duty of a public officer, at stated times and to certain other officers, to re-

- port and pay over certain funds officially received by him, upon his failure so to do, a right of action thereby accrues against him, without demand. *Moore, Adm'r, v. The State ex rel. Denny, Att'y Gen'l*, 360
2. *Same.—Unclaimed Moneys.*—If the clerk of the circuit court of any county fail, at the times prescribed by law, to account for and pay over all unclaimed docket, witness and jury fees, fines and moneys of estates, which by law he is at such times required to so account for and pay over, he thereby becomes liable, without demand, to an action therefor. *Ib.*
 3. *Same.—Statute of Limitations.*—Upon the institution of a suit against such clerk, to recover any of such funds which he has failed to so account for and pay over, he may avail himself of the statute of limitations of six years, as a defence. *Ib.*
 4. *Same.—Attorney General.*—The Attorney General is the proper relator, on behalf of the State, to bring such action, *Ib.*

COUNTY COMMISSIONERS.

See CITIES AND TOWNS, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; TURNPIKE; WILL, 2.

1. *Agricultural Society.—County Treasurer.—Injunction.—Construction of Statute.*—The board of commissioners of a county are not authorized by the act of March 8th, 1873, 1 R. S. 1867, p. 54, entitled "An act to encourage agriculture and agricultural fairs," etc., to make an appropriation to an agricultural society, out of the funds of such county, to assist such society in paying off its debts; and where, by the order of such board, such appropriation has been made, and the county auditor has issued a county order on the funds of such county, for the payment of such appropriation, the payment of such county order and appropriation may be enjoined, in a suit by a taxpayer of such county. *Warren County Ag'l, etc., Society et al. v. Barr*, 30
2. *Powers.—Statute Construed.—Bridge.—Donation to County.*—Under section 3d of "An act to provide for the erection and repair of bridges," etc., approved March 3d, 1855, the board of commissioners of a county have the right to receive, and to collect by suit, a subscription of money, made by an individual as a donation to such county, to assist in the erection of a bridge over a stream in such county. *Bingham v. The Board of Commissioners, etc.*, 113
3. *Appeal.*—The decision of the board of commissioners of a county, as to whether public convenience demands the erection of a bridge over a stream in such county is final, and can not be appealed from. *Ib.*
4. *Pleading.—Building Bridge on Private Property.*—To an action by the board of commissioners of a county to recover the amount of subscription of money, made by an individual to such county, as a donation to assist in the erection of a bridge over a stream in such county, it is not sufficient to answer that such board had no power to erect such bridge, because the same was erected upon, and became a part of, the road-bed of a private corporation, and for the use of which, since its erection, such corporation charged and collected toll, and that such bridge connected no highways controlled by such county or any township or road district therein. *Ib.*
5. *Rescission.*—In such action, to an answer averring that such subscription was made without consideration, and that before the erection of such bridge, or the taking of any steps therefor, the defendant had notified the plaintiff that he had rescinded and withdrawn such subscription, a reply is sufficient, which avers that the plaintiff, upon the faith of the defendant's subscription, had incurred great expense in preparing and advertising for proposals for letting, and had let, the

- contract for the erection of such bridge, which, since such notice of rescission and prior to the bringing of the action, had been erected. *Ib.*
6. *Relocating County Seat.—Fraud.—Injunction.*—Fraud consummated in and by the final order of a board of commissioners, relocating the county seat and directing the erection of a new court-house and jail, practised upon such board by the petitioners, is sufficient ground to sustain an independent proceeding in the circuit court to procure an injunction against such board, restraining them from carrying out such order. *Markle et al. v. The Board, etc., of Clay County et al., 185*
 7. *Same.*—Fraud in such proceedings, practised upon such board by the petitioners, in the procuring of fraudulent signatures to the petition for such order, or in any other matter which might have been contested before such board, during the pendency of such petition, is not ground sufficient to obtain such injunction. *Ib.*
 8. *Same.—Pleading.*—Where an injunction in such case is sought to be obtained on account of a fraud practised and consummated three years prior to the commencement of such action, if such delay be unexplained in the complaint, it is insufficient on demurrer, *Ib.*
 9. *Same.*—In an action to obtain such injunction the complaint must allege that such court-house and jail, the building of which is sought to be enjoined, have not already been erected. *Ib.*
 10. *Powers.—Poor Farm.*—The board of commissioners of a county have a right, *prima facie*, to purchase a tract of land to be used as a home for the poor of their county, and such right can not be questioned in a collateral proceeding, *Holten v. The Board of Comm'rs of Lake Co., 194*
 11. *Same.—Common Schools.—Injunction.*—A county board has no authority to make an appropriation of any sum, out of the general fund of their county, for the erection of a school building; and, if made, its payment may be enjoined, in an action for that purpose by a taxpayer of such county. *Rothrock v. Carr et al., 334*
 12. *Statute Construed.—Discretionary Allowance.*—Section 7 of the act of May 27th, 1852, "to authorize and limit allowances," etc., (1 R. S. 1876, p. 63) does not authorize county boards to "make allowances at their discretion" for purposes unauthorized by law. *Ib.*

COUNTY SEAT.

See COUNTY COMMISSIONERS, 6, 7, 8, 9.

COUNTY SUPERINTENDENT.

See ATTORNEY GENERAL.

COUNTY TREASURER.

See COUNTY COMMISSIONERS, 1.

COVENANT.

See CONVEYANCE.

Collateral Warranty.—Breach.—Suit Against Heir.—Statute of Limitations.—Statute Construed.—Measure of Damages.—Notice.—Husband and Wife.—Pleading.—A testator dying the owner of a tract of land, devised it to his widow during her life, with remainder in fee to A. and B., in common; such widow marrying C., she and C., by a deed containing a covenant of title, specially binding themselves and their heirs in stipulated damages, for a breach thereof, jointly conveyed such land to another, who then conveyed it to A.; C., first, and then such widow, dying, D., their child, inherited and received an estate from his father,

C.; afterwards, and after the estate of the latter had been finally settled according to law, B., in an action for that purpose against A., obtained a decree settling in himself the title to and the right of possession of the undivided half of such land, thus causing a breach of such covenant of title made by C. and his wife, and for which breach A. brought an action against D. as the heir of C.

Held, on demurrer, that the right of action for such breach not having accrued until after the final settlement of C.'s estate, it is not barred, either by such final settlement, or by the provisions of sections 62 and 178 of the act of June 17th, 1852 (2 R. S. 1876, p. 491) "providing for the settlement of decedents' estates," etc.

Held, also, that D. is liable for such breach, in damages not exceeding the amount of estate received by him of C.

Held, also, that such covenant is not personal but runs with the land, and a breach thereof is sufficiently shown by an averment of an eviction of A. by B., under a paramount title.

Held, also, that an averment that A. had been in possession of such land is unnecessary.

Held, also, that it is unnecessary to aver that D. had had notice of such action by B., against A.

Held, also, that the fact that a married woman is not bound by her covenant, in which her husband joins in conveying her land, does not release him.
Blair v. Allen, 409

CRIMINAL LAW.

1. *Keeping Gaming Apparatus*.—The keeping of a gaming apparatus, commonly called a "trick knife," for the purpose of wagering, winning and gaining money and articles of value thereon, is a misdemeanor, and not a felony.
Hayes v. The State, 99
2. *Repeal of Statute*.—*Construction of Statute*.—Section 38 of the act of 1852, defining felonies, (2 R. S. 1876, p. 442) so far as it relates to the keeping of gaming apparatus, is repealed, by implication, by the act of March 15th, 1875, (2 R. S. 1876, p. 480) amending the 74th section of the act of 1852, defining misdemeanors.
Ib.
3. *Habeas Corpus*.—*Bail*.—*Murder*.—Where a defendant is confined in jail upon an indictment for murder, he is entitled to be admitted to bail, on petition therefor, upon showing either that the proof of his guilt is not evident, or that the presumption thereof is not strong.
Ex Parte Jones et al., 176
4. *Burden of Proof*.—Upon the hearing of such petition, the burden of proof is upon the defendant.
Ib.
5. *Presumption*.—Upon the hearing of such petition, the presumption of law is against, not in favor of, the defendant's right to be admitted to bail.
Ib.
6. *Larceny*.—*Indictment*.—An indictment charging the defendant with having unlawfully and feloniously stolen, taken and carried away "bank-bills" of a certain denomination, "a more particular description of which bank-bills can not now be given," of a certain specified value, and the property of a person named, is sufficient on motion to quash.
Hart v. The State, 599
7. *Evidence*.—On the trial of the defendant upon such indictment, a conviction upon evidence describing the property simply as "bills" is erroneous.
Ib.
8. *Judicial Notice*.—The courts of this State take judicial notice of the fact that there are classes of notes and bills, other than bank-bills, in circulation as money.

DAMAGES.

See COVENANT; GUARDIAN AND WARD, 6, 7; LANDLORD AND TENANT, 5; WARRANTY.

1. *Measure.—Nominal.—Contract to Publish Legal Notice.*—A complaint for damages alleged that the plaintiff, a retailer of intoxicating liquors, licensed under the law of this State, to obtain a renewal of such license, then about to expire, paid to the defendant, the proprietor of a weekly newspaper, a certain sum, for which the latter agreed to publish, in such newspaper, a sufficient, timely notice of the plaintiff's intention to apply to the proper county board for such license; but that, on account of the defendant's failure so to do, the plaintiff had failed to obtain such license, and was compelled to suspend such business for a certain period.
Held, on demurrer, that such cause of action is sufficient to entitle the plaintiff to more than nominal damages,
Held, also, that the plaintiff is entitled to damages in at least the amount of such price so paid.
Held, also, that such price, though but three dollars and fifty cents, is not so small as to bring the cause, on appeal to the Supreme Court, within the rule, *de minimis non curat lex*.
Held, also, that the fact that the plaintiff's business property was rendered useless during and by such suspension of business should be considered in estimating his damages.
Held, also, that mere speculative profits, which the plaintiff might have realized if his business had not been suspended, are not a proper basis upon which to assess his damages. *Glass v. Garber et al.*, 336
2. *Custom —Surplusage.*—An allegation in such complaint as to a custom in the defendant's office of furnishing copy of the forms of such notices is mere surplusage. *Ib.*

DECEDENTS' ESTATES.

See CITIES AND TOWNS, 4; COVENANT; MORTGAGE, 2; PLEADING, 9; STATUTE OF LIMITATIONS, 1.

1. *Removal of Administrator.—How Procured.*—An administrator of a decedent's estate, which is in process of settlement, can only be removed upon the verified petition of a person interested in such estate, or of a co-administrator, or of the surety of such administrator, specifying one or more causes for removal. *Vail, Adm'r, v. Givan et al.*, 59
2. *Pleading.*—Where a petition for the removal of an administrator of the estate of a decedent is filed by a person claiming an interest in such estate, the petition must show the nature of such interest, by alleging the facts constituting it. *Ib.*
3. *Same.*—Upon the petition of a creditor asking an order upon such administrator to pay off a claim, held by the former against such estate, but neither asking, nor assigning any statutory reason, for the removal of such administrator, the court can not order his removal, nor appoint a successor to him in such trust. *Ib.*
4. *Administrator.—Final Settlement.—Surplus.—Escheat.*—Where, from the final settlement report of the administrator of a decedent's estate, it appears that there is a surplus in his hands for distribution, upon the expiration of two years from the filing and approval of such report, without the appearance of any heirs to claim such surplus, it escheats to the State, and it is the duty of the court to order such administrator to pay such surplus to the proper county treasurer, for the use of the State. *Fuhrer, Adm'r, v. The State, ex rel. The Att'y Gen'l*, 150
5. *Same.—Removal of.—Successor.—Prosecuting Attorney.*—Upon the failure

of the administrator to obey such order, it is the duty of the court to remove such administrator and appoint his successor, who should bring suit against his predecessor, on his bond; and it is the duty of the prosecuting attorney of such court to prosecute such suit. *Ib.*

6. *Same.—Attorney General.—Parties.—Statute Construed.*—Upon the failure of the court to so order the administrator to so pay over such surplus, or upon the failure of such administrator to obey an order so made, if the court shall have failed to so remove such administrator and appoint his successor, or if, upon the removal of such administrator and the appointment of his successor, the prosecuting attorney shall have failed to institute and prosecute such suit, after the lapse of twelve months from the time when any such judicial or official action becomes necessary, the State, on the relation of her attorney general, may institute a suit on such bond, to recover such surplus. *Ib.*
7. *Same.—Supreme Court.—Practice.*—If no exception be taken to the summary order of court, removing the administrator of an estate, of which such court has jurisdiction, and directing that he forthwith account for the assets of such estate, he will be deemed, on appeal to the Supreme Court, to have acquiesced therein. *Ex Parte Simpson, Adm'r, 415*
8. *Circuit Court.—Jurisdiction.—Action Against Estate and Another.—Judgment.—Mortgage.—Notice.—Summons.*—A testator, dying seized in fee of lands, devised them to his widow during her widowhood, with remainder in fee, in common, to his children, part of whom conveyed their portions of such remainder to a purchaser; such widow having died, such purchaser commenced a joint action in the circuit court, against the administrator of her estate, and the guardian of another, by filing a complaint upon the probate appearance docket, and issuing a summons thereon to such guardian, alleging in his complaint, that, after he had received such conveyance, such widow had committed waste upon the inheritance, by cutting and selling timber growing thereon, with the proceeds of which she had purchased a tract of land and caused the same to be conveyed to such ward, and then died, leaving an estate insufficient to pay him his damages, judgment for which he demanded against such administrator, and also that such ward's said land be subjected to the payment of any deficiency which could not be realized from such estate.
Held, that the circuit court has now the same probate jurisdiction as formerly belonged to the common pleas court, but that it is entirely independent of its jurisdiction in ordinary civil actions.
Held, also, that a simple claim against a decedent's estate must be filed, and entered upon the appearance docket by the clerk.
Held, also, that judgment or mortgage liens upon the estate or property of a decedent can not be filed nor adjudicated as are simple claims.
Held, also, that the action in this case, being a joint one against such administrator and guardian, could not be commenced by filing a complaint upon the appearance docket, but ought to have been commenced as an ordinary civil action.
Held, also, that a summons upon a simple claim against a decedent's estate is not contemplated by the statute, the filing and entry of such claim being sufficient notice to the administrator.
Held, also, that the summons in this cause, to such guardian, ought not to have been issued, and the service thereof gave such court no jurisdiction over him; and, therefore,
Held, also, that all parts of such complaint, as to such guardian or his ward, were properly stricken out, and the action as to him dismissed, on motion.
Held, also, that such complaint, thus eliminated, constitutes a sufficient claim against such estate, and is within the probate jurisdiction of such court.
Held, also, that the will of such testator, though made part of such com-

plaint, is not the basis of the action for waste, and can neither control nor aid any of the averments of such complaint.

Held, also, that, by the averments of the complaint, such widow had a life-estate, only, in such lands. *Noble v. McGinnis et al.*, 528

DEMAND.

See COUNTY CLERK, 1, 2; MORTGAGE, 2; REDEMPTION, 1.

DEMURRER.

See PRACTICE, 9, 14; SUPREME COURT, 3, 10, 12, 15, 16, 28, 35.

DEMURRER TO EVIDENCE.

See FRAUD, 1, 2, 3.

DEPOSITION.

1. *Notice*.—The fact that the certificate to a deposition shows it to have been taken at the "city," instead of at the "town," of A., as specified in the notice of such taking, is no cause for suppressing such deposition. *Harvey v. Osborn*, 535
2. *Presumption*.—*Practice*.—In the absence of an affidavit showing them to be different places, it will be presumed that the office of the clerk of the "county court," etc., at which the certificate to a deposition shows it to have been taken, is the same place as the office of the clerk of the "county," etc., where the notice specified it would be taken. *Ib.*
3. *Court of Record*.—A court having a clerk and a seal is "a court of record." *Ib.*
4. *Official Character*.—*Waiver*.—*Clerk of Court*.—If proof of the official character of an officer before whom a deposition is to be taken be waived, his certificate thereto, under the seal and as the clerk of a court, and such waiver, are sufficient evidence that such deposition was taken by the "clerk of a court of record." *Ib.*
5. *Same*.—Where a deposition is taken before the "clerk of a court of record" he must certify to the same under the seal of such court. *Ib.*
6. *Same*.—*Officer*.—*Notice*.—The notice of the taking of a deposition need not specify before what particular officer it will be taken; but if it does so specify, the fact that it was taken before a different officer will not render the deposition invalid. *Ib.*

DESCENTS.

See SPECIFIC PERFORMANCE.

1. *Adultery of Wife*.—*Widow*.—Where a wife has abandoned her husband, and at the time of his death is living in adultery, the 32d section of the statute of descents of this State prevents her from inheriting any part of his estate. *Goodwin v. Owen et al.*, 243
2. *Same*.—*Statute Construed*.—Habitual illicit intercourse of the wife with men, no difference with whom in particular, or where, is a "living in adultery" within the meaning of such section. *Ib.*
3. *Same*.—*Posthumous Child*.—*Mother*.—If a woman who was "living in adultery" at the decease of her husband give birth to a legitimate, posthumous child, begotten by him, it will inherit from such decedent, and, on its death, she will inherit from her child. *Ib.*

DISAFFIRMANCE.

See INFANT.

EMINENT DOMAIN.

See CITIES AND TOWNS, 7.

ESCHEAT.

See DECEDENTS' ESTATES, 4, 5, 6.

ESTOPPEL.

See FORMER ADJUDICATION; HUSBAND AND WIFE, 4; REAL ESTATE, ACTION TO QUIET TITLE, 3.

EVIDENCE.

See BANKRUPTCY, 4; CITIES AND TOWNS, 4; CONTRACT, 1, 2; CONVEYANCE, 3; FRAUD, 6; HIGHWAY, 4; HUSBAND AND WIFE, 6; LIQUOR LAW, 2, 3, 4; MECHANIC'S LIEN, 7; NEW TRIAL, 5; PRACTICE, 2, 13; PROMISSORY NOTE, 1, 9; RAILROAD, 6; REAL ESTATE, ACTION TO QUIET TITLE, 1, 6, 7; REAL ESTATE, ACTION TO RECOVER, 1, 2; SLANDER, 6; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 1.

1. *Witness.—Impeachment.*—Where, on the trial of a cause, declarations by a witness, made out of court, contradicting testimony given by him in such cause, are given in evidence to impeach him, the party calling him may give evidence of other declarations, made by him out of court, in harmony with his testimony, for the purpose of supporting it.
Brookbank v. The State, ex rel. Murphy, 169
2. *Same.*—Evidence of declarations in harmony with the testimony of a witness is not limited to those made before the time when his declarations, given in evidence to impeach him, were made. *Ib.*
3. *Opinion of Witness.*—Where the value of property is an issue in a cause, any witness acquainted with such property may testify as to its value, stating also the facts upon which he bases his opinion.
Holten v. The Board of Comm'rs of Lake Co., 194
4. *Insolvency.—Principal and Surety.*—Evidence of the reputation of a principal debtor, as to his solvency or insolvency, is incompetent to show whether or not he has paid a debt for which another was surety.
Ib.
5. *Principal and Agent.—Attorney.*—Declarations of the general attorney of a county, that she would pay a certain debt, are not admissible as evidence in a suit upon such claim, against such county. *Ib.*
6. *Parol Evidence of Writing.*—Without proof accounting for the absence of a writing, parol evidence of its contents is inadmissible. *Ib.*
7. *Original.*—Because it is "the original" is no ground of objection to the admission, as evidence, of the original præcipe for an execution. *Ib.*
8. *Conveyance.—Consideration.*—In an action to recover for the price of land sold and conveyed by the plaintiff, to the defendant, the consideration expressed in the deed of conveyance may be contradicted by parol evidence.
Stearns v. Dubois, 257
9. *Quantum Valebat.*—Where, in an action to recover for the price of property sold by the plaintiff to the defendant, the complaint contains one paragraph based on a special contract, and another on the *quantum valebat*, under the latter the plaintiff may introduce evidence in chief, of the value of such property. *Ib.*
10. *Admissions.—Practice.*—Where, in such cause, under an alleged special contract as to such price, differing from that set up by the plaintiff, the defendant has testified in support thereof, and in contradiction of the testimony of the plaintiff, the latter, at the conclusion of the evidence for the defendant, may then introduce evidence of declarations by the defendant, as to such contract price. *Ib.*
11. *Highway.—Report of Viewers.*—The report of viewers appointed by a county board to view a proposed location or change of a highway is not competent evidence for any purpose, upon the trial of such cause, on appeal to the circuit court.
Freck v. Christian, 320

12. *Suretyship*.—Where, on the trial of the question of suretyship, as between A. and B., the makers of a promissory note upon which they have been sued, upon pleadings by each, alleging that he was the surety and the other the principal, and the evidence established that such note had been given for a loan of money by the payee, and that when such money was procured, A., in the presence of B. and the payee, took such money and carried it away, it is competent for A., in order to rebut any inference, arising from such evidence, that he was the principal, to introduce evidence to show that B. was, at the time of such loan, indebted to him, as a circumstance tending to support his own testimony that B. had procured such loan to pay such indebtedness. *Harvey v. Osborn*, 535
13. *Leading Question*.—A question in the nature of a direction to the witness to whom it is put, to state what if any knowledge he has concerning a material matter in controversy, to which his attention is, by the same question, called, is not leading. *Ib.*
14. *Same*.—A question which suggests to the witness, and leads him to make, the answer desired, is leading. *Ib.*

EXECUTION.

See **FIXTURE**, 3, 4; **FRAUD**; **PRINCIPAL AND SURETY**, 1; **STATUTE OF FRAUDS**, 2.

EXECUTOR AND ADMINISTRATOR.

See **DECEDENTS' ESTATES**, 1, 2, 3, 4, 5, 6, 7.

FIXTURE.

See **REPLEVIN**.

1. *Realty.—Personalty*.—The fact that a stationary mill, belonging to two persons jointly, has been placed upon and affixed to the real estate of one of them, for manufacturing purposes, under a temporary shed, the posts of which are let into the soil, does not constitute it part of such realty, if treated by such owners as personalty. *Young v. Baxter*, 188
2. *Same*.—The fact that such personalty was so attached to such realty, without the agreement of a judgment creditor having a judgment lien upon such land, that it should be treated as personalty, will not give to the latter the right to treat it as a part of the realty, if it can be removed without injury thereto. *Ib.*
3. *Same.—Execution.—Exemption*.—In such case, where an execution against the owner of such real estate is levied thereon, he may demand that such realty be set off to him as exempt from execution, by an appraisement which will not include such mill property. *Ib.*
4. *Same.—Mandate.—Appraisement*.—Where, in such case, the sheriff holding such writ has caused such realty to be appraised, without including such mill property, and set off to such execution defendant, the execution plaintiff is not entitled to a writ of mandate to such sheriff, to compel him to have such realty so appraised as to include such mill property. *Ib.*

FORECLOSURE.

See **MORTGAGE**, 1; **NEW TRIAL**, 1; **REAL ESTATE, ACTION TO QUIET TITLE**, 6, 9; **REDEMPTION**, 2; **USURY**, 2.

FORFEITURE.

See **REDEMPTION**, 1.

FORMER ADJUDICATION.

See PLEADING, 10; PROMISSORY NOTE, 5.

Estoppel.—Suretyship.—Proceeding to determine the question of suretyship, as between A. and B., the defendants in an action upon a promissory note, wherein A. had appeared and answered and B. had made default. To a complaint by A. alleging himself to be the surety, only, and B. to be the principal, B. answered, alleging as matter of estoppel, that in the answer by A., in the original action, he had alleged such suretyship on such note, and that upon the trial of such original action a finding had been rendered by the court, for the plaintiff and against A., upon such issues.

Held, on demurrer, that such answer by B. is insufficient.

Held, also, that, to such answer by A. to the original complaint, B. could not have demurred or pleaded, and therefore the matters therein alleged were not *res adjudicata*, as between A. and B.

Harvey v. Osborn, 535

FRAUD.

See CONTRACT, 3, 4, 5, 6, 8, 9; COUNTY COMMISSIONERS, 6, 7, 8, 9; PROMISSORY NOTE, 2, 3, 6, 7, 14; STATUTE OF LIMITATIONS.

1. *Demurrer to Evidence.—Conveyance.—Husband and Wife.*—On the trial of an action by a judgment creditor, to set aside certain alleged fraudulent conveyances, made and procured by his debtor, transferring his land to his wife, through a third person, and to subject the same to execution, the evidence on behalf of the plaintiff established that the debtor, prior to his becoming indebted to the plaintiff, had acquired title to the land in question; that subsequent to the incurring of such debt, such debtor and his wife, by deed, conveyed the land to a third person, who, with his wife, in like manner, conveyed the same to the wife of the debtor; that though both of said last named conveyances purported to be for a valuable consideration, yet no consideration for either passed between the parties thereto; that about two years afterward, the plaintiff recovered a judgment against the debtor, for the amount of said debt; and that an execution on such judgment having been issued to the proper officer, the debtor had then no property subject to execution, and such writ was returned "unsatisfied."

Held, that a demurrer, by the defendant, to such evidence, was properly sustained.

Held, also, that though on a demurrer to such evidence, every fair inference deducible therefrom must be taken against the party demurring, yet fraud, in the execution of such conveyances, was not deducible from such evidence and could not be presumed.

Eagan v. Downing et al., 65

2. *Husband and Wife.*—Where a husband, retaining ample means to pay all his debts, conveys a part of his property to his wife, such conveyance is good as to future creditors, at least. *Ib.*
3. *Pleading.*—To a complaint by a judgment creditor, to set aside an alleged fraudulent conveyance of the lands of his judgment debtor to the wife of the latter, and to subject the same to execution, it is a sufficient answer by the wife, to allege that such lands had been purchased from a third person and wholly paid for by her, through her husband as her agent, out of her own separate estate, but that, without her knowledge or consent, said lands had been conveyed to her husband, such judgment debtor, who had, on her demand, made the conveyance sought to be set aside. *Ib.*
4. *Conveyance to Defraud Creditors.*—Lands purchased with the means of a judgment debtor having no property subject to execution, and by him procured to be conveyed to himself and wife jointly, with the right of

survivorship, for the purpose of defrauding his creditors, may be subjected to an execution upon such judgment, in an action for that purpose, against such grantees. *Wilds et al. v. Bogan*, 331

5. *Alteration of Conveyance*.—Such action may be in like manner sustained, where such conveyance has first been so procured and made to the debtor himself, and afterwards changed by inserting the name of his wife, with a clause of survivorship. *Ib.*
6. *Evidence*.—On the trial of such cause, if the evidence does not identify such land nor show any title thereto in such debtor, nor by whom the purchase-money therefor was paid, judgment should be rendered for the defendants. *Ib.*

GIFT.

See MORTGAGE, 2.

GUARANTY.

See CONVEYANCE, 1.

GRAVEL ROADS.

See TURNPIKE.

GUARDIAN AND WARD.

1. *Conversion of Ward's Estate*.—Where a guardian has become insolvent, and the penalty of his bond has been exhausted in a suit thereon, by a judgment against him and his surety, leaving an unsecured deficiency in the amount yet due to the ward, nevertheless the latter, in an action therefor, is entitled to a decree against such guardian, such surety, and the assignee and judgment defendant, vesting in the ward title to a judgment, for an amount not exceeding such deficiency, against such defendant, wrongfully procured by such guardian in his own name, upon a chose in action belonging to his ward's estate, and unlawfully assigned to such assignee, who received the same with knowledge of such conversion. *Moon et al. v. Martin et ux.*, 218
2. *Same.—Tender*.—In such action it is no defence, that, prior to its commencement, and prior to his procuring such judgment, the guardian had offered to transfer such chose in action to the ward, upon condition that the latter would receipt the former for the amount thereof as so much cash upon the amount due to the ward, if such tender be not kept good by bringing it into court. *Ib.*
3. *Action on Bond*.—In an action by a ward against his guardian, upon the latter's bond, for several different breaches of the condition thereof, they may all be joined in one and the same paragraph of complaint. *Richardson, Adm'r, et al. v. The State, ex rel. Crow, etc.*, 381
4. *Same.—Instruction to Jury.—Conversion*.—On the trial of an action upon a guardian's bond, for alleged conversion of his ward's estate, it is error for the court to instruct the jury trying the cause, that if such guardian has taken "notes, for money belonging to his ward, payable to himself in his own name, that, in law, would amount to a conversion of his ward's estate." *Ib.*
5. *Allowance for Services*.—Where, from the evidence given on the trial of such cause, it appears that such guardian is entitled to no allowance for his services, as such, he can not complain of an erroneous instruction to the jury by the court, as to the value of his services. *Ib.*
6. *Measure of Damages.—Statute Construed*.—The measure of the damages that may be recovered in an action upon a guardian's bond is prescribed by clause 3 of section 9 (2 R. S. 1876, p. 589) of the act of June 9th, 1852, "touching the relation of guardian and ward," and is "ten per cent. in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward." *Ib.*

7. *Same*.—Section 13 (2 R. S. 1876, p. 592) of the act touching the relation of guardian and ward does not contemplate that section 163 of the act providing for the settlement of decedents' estates shall govern, as providing a measure of damages, in suits upon a guardian's bond. *Ib.*

HABEAS CORPUS.

See CRIMINAL LAW, 3, 4, 5.

HIGHWAY.

See EVIDENCE, 11.

1. *Amendment of Petition*.—During the pendency of a proceeding, before a county board, to establish a highway, or on appeal therefrom to the circuit court, the petitioners are entitled to amend their petition so as to show to whom each separate tract of land to be affected by the proposed highway severally belongs, upon proof that all of the owners or occupants of such lands have been duly notified of the pendency thereof. *Hedrick et al. v. Hedrick et al.*, 78
2. *Variance*.—Where all the owners of lands which will be affected by the construction of a proposed highway have been duly notified of the pendency of a petition to establish such highway, but the petition and notice are defective in not averring to whom each separate tract of such lands severally belongs, an amendment of such petition so as to show such ownership will not constitute a fatal variance between such petition and notice. *Ib.*
3. *Description of Route*.—The description of the route of a proposed highway petitioned for was, "passing over and upon the line dividing the lands of" certain owners, named.
Held, that such description is sufficient, and is equivalent to an averment that such route was over and upon such lands, and along the line dividing them. *Ib.*
4. *Evidence.—Instruction to Jury*.—Where, from the order of a board of commissioners locating a highway, a remonstrant has appealed to the circuit court, the cause there stands for trial, *de novo*; and neither the reports of the viewers and reviewers appointed by such board to view the location of the proposed highway, nor a certified copy of the same, are competent evidence on such trial; and the action of such court in admitting, and in instructing a jury trying such cause to regard, them as evidence is erroneous. *Coyner v. Boyd et al.*, 166
5. *Practice.—View by the Jury*.—During the trial of such cause in the circuit court by a jury, the court may, where damages are claimed by the remonstrant, under the 328th section of the practice act, allow such jury to view the route of the proposed highway. *Ib.*
6. *Names.—Initials*.—Where the petition for the location of a highway, in alleging the names of the owners of lands which will be affected by the construction thereof, only sets out the initials of the Christian name, or the partnership name, only, of any of such owners, it is fatally defective on motion in arrest of judgment. *Vawter v. Gilliland et al.*, 278
7. *Report of Viewers*.—Upon appeal of such proceeding to the circuit court, the report of the viewers appointed by the county board can not be called in question. *Ib.*
8. *Supervisor*.—Where, in the exercise of an honest, though an erroneous, judgment that it is necessary for the repair of a highway in his road district, a supervisor so constructs a dam that the flow of an ancient watercourse is thereby diverted from its original channel, in such manner as to overflow and damage the land of a neighboring proprietor, the remedy of the latter is by an application for an assessment of his damages, under section 16 of the act of March 5th, 1859, in relation to

supervisors, (1 R. S. 1876, p. 855) and not by an action against such supervisor, personally. *McOsker v. Burrell*, 425

9. *Same.*—Where, in such case, the lands of an adjoining proprietor are so injured, not because of the negligence of a supervisor in constructing such dam, but because of the failure of his successor to repair it, the former is not liable. *Ib.*
10. *Burden of Proof.*—If in making such repairs a supervisor acts in bad faith, negligently or corruptly, he is liable, personally, to any such owner sustaining damages thereby; but the burden of proof is upon the latter, to show such bad faith, negligence or corrupt motive. *Ib.*
11. *Assessment of Damages.*—The entering upon or taking of the property of another by a supervisor, as contemplated by such section 16 of the act in relation to supervisors, is a taking by the State, within the meaning of section 21, article 1, of the Constitution of this State, for which damages need not be first assessed and tendered. *Ib.*
12. *Petition.*—*Names.*—The petition for the location of a highway should not be dismissed because it sets out generally, and in the alternative, "the names of the owners, agents or occupants of the lands through which such proposed highway will pass," without specifying in which of such relations, to any of the tracts of lands therein described, any of such persons stand. *Meyers et al. v. Brown et al.*, 596

HUSBAND AND WIFE.

See COVENANT; FRAUD; LIQUOR LAW, 1, 2, 3, 4.

1. *Coverture.—Pleading.*—If, in an action against a married woman, upon a contract made by her, the complaint does not affirmatively show that such coverture existed at the time of making such contract, to avail herself of such disability as a defence, she must plead it. *Long et al. v. Dixon et al.*, 352
2. *Same.*—In an action against a married woman and another to recover for the purchase-money of a tract of land sold to her codefendant, and, at his request, conveyed to her, an averment in the complaint that such conveyance "was made to said defendant," naming her, "wife of," etc., is not available to her on demurrer, as showing coverture. *Ib.*
3. *Parties.*—In such action she is a proper party defendant, and to avail herself of her coverture to avoid a personal judgment on her implied contract to pay for such land, she must plead it. *Ib.*
4. *Estoppel.—Married Woman.*—Though the promissory note of a married woman, executed during her coverture, is void, yet if, in an action thereon, she make default and a judgment be rendered against her, she is forever estopped from denying or collaterally attacking it. *Burk et al. v. Hill*, 419
5. *Real Estate, Action to Recover.*—If the real estate of a married woman be sold at sheriff's sale, on a decree rendered against her in an action on a promissory note, and a mortgage on such real estate, executed by her during her coverture, and, on her failure to redeem the same, it be conveyed by the proper sheriff, to the purchaser at such sale, the latter may maintain an action to recover the possession of such realty from her. *Ib.*
6. *Same.—Evidence.*—On the trial of such suit, evidence by the defendant, to show that she was a married woman at the time of the execution of such promissory note, is inadmissible. *Ib.*

INDEMNITY.

See MORTGAGE, 3, 4, 5; PLEADING, 8.

INFANT.

See MASTER AND SERVANT.

Disaffirmance.—Marriage Contract.—Judgment.—Where an infant judgment creditor, by the promise of the judgment defendant and his replevin bail, that upon her entering satisfaction of such judgment, the former will marry her, is induced, upon that consideration alone, to enter such satisfaction, she may, upon her arriving at the age of twenty-one years, and upon the failure of said defendant to marry her, disaffirm such contract, and, in a suit against such judgment defendant and his replevin bail, have such entry of satisfaction vacated, notwithstanding the fact that at the time of making such marriage contract she was of the age of eighteen years. *Reish v. Thompson*, 34

INJUNCTION.

See BANKRUPTCY, 1; CITIES AND TOWNS, 14, 17; COUNTY COMMISSIONERS, 1, 6, 7, 8, 9, 11; SUPREME COURT, 9; WASTE.

Practice.—A motion to reinstate a temporary restraining order, which has been dissolved, is, in effect, a motion for a new and different order. *Ogle et al. v. Dill et al.*, 130

INSANITY.

See REAL ESTATE, ACTION TO RECOVER, 1, 2, 3.

Statute Construed.—By the phrase, "a person of unsound mind," as used in the 11th section of the act of May 29th, 1852, "defining who are persons of unsound mind," etc., (2 R. S. 1876, p. 598) is meant, only, a person who has been so found in a proceeding for that purpose under such statute. *Freed et al. v. Brown et al.*, 310

INSOLVENCY.

See EVIDENCE, 4; GUARDIAN AND WARD, 1; PRINCIPAL AND SURETY; STATUTE OF LIMITATIONS; WATERCOURSE, 3.

INSTRUCTIONS TO JURY.

See GUARDIAN AND WARD, 4; HIGHWAY, 4; PRACTICE, 13; RAILROAD, 7; STATUTE OF FRAUDS, 3; SUPREME COURT, 37; WARRANTY; WITNESS, 3.

INTERROGATORY TO JURY.

See CONTRACT, 9; NEW TRIAL, 10.

1. *Supreme Court.—Practice.*—The question as to whether judgment should have been rendered upon answers of a jury to interrogatories, notwithstanding and contrary to their general verdict, can not be raised for the first time in the Supreme Court. *Trillipo v. Lacy*, 287
2. *Answers.—Uncertainty.*—Where to a pertinent, direct interrogatory, put to the jury trying a cause, they return an uncertain or doubtful answer, the court trying such cause must, on motion therefor, made before the discharge of such jury, instruct them to return a direct and certain answer. *Peters v. Lane et al.*, 391
3. *Same.*—Where the answer to an interrogatory is in other respects certain and direct, the prefacing or adding thereto, by the jury, of the phrase, "in our judgment," does not render it uncertain. *Ib.*
4. *Venire de Novo.*—Where the answer of a jury to a pertinent, direct interrogatory is uncertain, a motion for a *venire de novo* should be sustained. *Ib.*

JOINDER OF ACTIONS.

See GUARDIAN AND WARD, 3; SUPREME COURT, 8.

JUDGMENT.

See CONTRACT, 9; COSTS, 1; DECEDENTS' ESTATES, 8; INFANT; PARTITION, 2; PLEADING, 10; REDEMPTION, 2; SUPREME COURT, 2, 9, 18; STATUTES OF LIMITATIONS; UNITED STATES COURTS, 1.

1. *Appraisement*.—In an action upon a promissory note not containing any waiver of relief from valuation laws, judgment without such relief should not be rendered; but if the defendant appear to the action and allow such judgment to be rendered without objecting, he can not raise such question for the first time, in the Supreme Court, on appeal.
Johnson v. Prine, 351
2. *Appeal—Supreme Court*.—A defendant against whom a judgment has been rendered, by default, by the circuit court, without first having acquired jurisdiction of his person, may, in the first instance, appeal to the Supreme Court, without applying to such circuit court to set aside such judgment.
Kyle et al. v. Kyle, 387

JURISDICTION.

See DECEDENTS' ESTATES, 8; PROCESS, 4; UNITED STATES COURTS, 1.

JURY.

See HIGHWAY, 5.

JUSTICE OF THE PEACE.

See PLEADING, 1.

LANDLORD AND TENANT.

See WASTE, 1, 2, 3, 4; WILL, 1.

1. *Tenant for Life—Repairs*.—The tenant of an estate for life is bound to keep in repair the improvements which are upon it at the time it comes into his possession, except where the same are destroyed by the act of God.
Miller v. Shields et al., 71
2. *Sheriff's Sale*.—A conveyance of the land of a judgment debtor, by virtue of a sale thereof upon an execution or decree, does not create the relation of landlord and tenant, between the person receiving such conveyance and such debtor.
Powell v. DeHart, 94
3. *Lease—Repairs*.—Where, by the terms of a lease of lands, for a term to commence at a specified time in the future, the lessor binds himself to make certain stipulated improvements or repairs upon such lands, prior to the time when possession is to be given and such term to commence, the lessee may refuse to accept possession thereof, if, at such date, such repairs or improvements shall not have been made.
Hickman et al. v. Rayl, 551
4. *Same*.—The fact that the lessor was prevented from making such repairs or improvements by circumstances over which he had no control, even by the act of God, is no excuse for his failure.
Ib.
5. *Same—Damages*.—Such failure is a breach of the terms of the lease, which can not be mended by an offer, by the lessor, to compensate the lessee for all damages he may sustain thereby; nor by an averment that such breach was one by which the lessee could sustain no damage.
Ib.
6. *Contract—Promissory Note*.—If, upon the execution in writing, of such lease, containing such stipulations, a promissory note be executed by the lessee to the lessor, for the rent of such term, each is but part, and both together the whole, of one contract; and if, because of the failure of the lessor to put the premises leased in the condition so agreed upon, the lessee shall have failed and refused to accept possession thereof, the latter, in an action against him by the lessor, upon such

note, may aver and prove such failure by the lessor, as a defence to the entire action. *Ib.*

7. *Same.—Performance.*—Where, in such action, the stipulation to have been performed by the lessor was the erection, by the time that possession was to have been given, of a certain fence upon the premises leased, part of which, only, had been so completed, the fact that he had been prevented from completing the remainder, being a portion crossing a stream, until after such date of possession, by reason of high water in such stream, does not constitute a good cause of reply to an answer by the lessee averring such failure. *Ib.*

LAW OF PLACE.

See WILL, 4.

LICENSE.

See WATERCOURSE, 1, 2, 3, 4.

LIEN.

See TURNPIKE, 1; VENDOR AND PURCHASER.

LIQUOR LAW.

See APPEAL; DAMAGES; PAYMENT.

1. *Law of 1873.—Suit by Wife.*—Where a person who held a license to sell intoxicating liquors, granted under the act of February 27th, 1873, (Acts Reg. Sess. 1873, p. 151) regulating the sale of such liquors, improperly sold intoxicating liquors to a man who was in the habit of becoming intoxicated, and who, by such sale, became intoxicated, and thereby failed to provide for his wife, and beat and abused her, she, as relatrix, could maintain an action for damages, against such person and his sureties, on the bond executed by him pursuant to the third section of such act. *Schlosser et al. v. The State, ex rel. Ellison, 82*
2. *Same.—Evidence.*—On the trial of such suit the evidence must establish that the defendant sold intoxicating liquors to the husband, causing or contributing to his intoxication, whereby the wife was injured in her person, property or means of support, and the bond sued upon must be given in evidence. *Ib.*
3. *Same.—Intoxicating Liquor.—Beer.*—Where, on the trial of such cause, the evidence showed that "beer," only, was sold to the husband by the defendant, but did not show what kind of beer it was, nor that it was intoxicating, the plaintiff was not entitled to recover. *Ib.*
4. *Same.*—Where, in such suit upon a liquor dealer's bond, upon the trial thereof, "it was agreed by the parties that the bond was executed as set out in the complaint," *Ib.*
Held, that such agreement did not waive the necessity of offering such bond in evidence. *Ib.*
5. *Same.—Action by Widow.*—Under section 12 of the act of February 27th, 1873, (Acts 1873, Reg. Sess., p. 151) regulating the sale of intoxicating liquors, etc., the widow of a deceased person, who came to his death as the result of injuries received by him from a fall whilst intoxicated, could not maintain an action for damages therefor, against a person who had unlawfully sold her deceased husband intoxicating liquors which had caused such intoxication. *Backes v. Dant, 181*
6. *Same.—Appeal.*—The repeal of such statute by the act of March 17th, 1875, (1 R. S. 1876, p. 869) did not take away the right of a subsequent appeal to the Supreme Court, by a party to a cause accruing under the former law, wherein a judgment had been rendered against

him, prior to such repeal; such action being a suit pending, within the proviso of section 21 of the latter act. *Ib.*

MALICIOUS PROSECUTION.

Suspicion.—Belief.—In an action to recover damages for malicious prosecution, the mere fact that the defendant had honestly suspected or believed the plaintiff to be guilty of the crime for which he had caused the latter to be prosecuted is no defence. *Graeter v. Williams*, 461

MANDATE.

See *FIXTURE*, 4.

MARRIAGE CONTRACT.

See *INFANT*.

MASTER AND SERVANT.

1. *Negligence.—Hazardous Employment.*—In an action by an employee, against his employer, to recover damages for injuries suffered by the former, whilst in the employment of the latter, one paragraph of the complaint alleged, that the defendant, being a contractor engaged in the construction of a railroad, employed the plaintiff, a minor, of the age of but fifteen years, to assist in certain non-hazardous work; but that the defendant, without giving to the plaintiff sufficient caution, warning or instruction, placed the latter in control of a wild, fractious and ungovernable horse, in a narrow, unsafe and dangerous space between two trains of cars, moved by steam-power in opposite directions, upon a high embankment; and that the plaintiff, whilst exercising due care and engaged in such hazardous employment, was thrown beneath and injured by one of said trains of cars.

Held, on demurrer for want of sufficient facts, that the paragraph is sufficient. *Hill et al. v. Gust, by His Next Friend, Gust*, 45

2. *Same.*—Where an employer places an employee of tender years at work, in a dangerous place, the former is bound to give to the latter due caution and instruction. And if the employee, whilst so employed, be injured, the fact that he could, by the use of his eyesight, have seen that such place was dangerous, is not sufficient evidence to hold such employee accountable for contributory negligence in causing such injury:—the question of negligence being one for the jury to determine from all the facts. *Ib.*

MASTER COMMISSIONER.

See *NEW TRIAL*, 6.

MEASUREMENTS.

See *REAL ESTATE, ALIENATION OF*, 1, 2.

MECHANIC'S LIEN.

1. *Material Man.—Liability.*—Section 647 (2 R. S. 1876, p. 266) gives to a material man a right to acquire a lien upon a building for which he has furnished material, and section 650 prescribes the means by which it is to be acquired; while section 649 gives to him a right, by taking the steps therein required, to hold the owner of such building personally liable for the value of such material; being separate and independent remedies. *Crawford et al. v. Crockett et al.*, 220
2. *Same.—Pleading.—Notice.*—To hold such owner personally liable for the price of such material, he must have been served with the notice required by such section 650, of an intention to hold him so liable; and for this purpose, a notice of an intention to acquire a lien upon his property is insufficient. *Ib.*

3. *Same.—Arrest of Judgment.*—Where, in an action to enforce a lien against the defendant owner's real estate, for the price of material sold to and used by a contractor in the erection thereon of a building, the complaint alleges, simply, that such material was furnished by the plaintiff to such contractor, and used by him in the construction of such building, it is bad on motion in arrest of judgment. *Ib.*
4. *Same.*—To hold the property of a person liable to a lien for the value of material used by his contractor in erecting a building thereon, the material man must have furnished it expressly for use in such building. *Ib.*
5. *Practice.—Parties.*—Where, in such action, a motion by the defendant owner in arrest of judgment is properly sustained on account of the insufficiency of the complaint, the fact that such contractor is a party defendant therein is no reason that the cause should not be struck from the docket on motion. *Ib.*
6. *Same.—Amendment.*—An amendment to a complaint to enforce a material man's lien, changing the nature of the action to one to enforce a personal liability against the defendant owner, but leaving the complaint fatally defective for want of an allegation that the proper notice had been given by the plaintiff, to the defendant, of the intention of the former to hold the latter thus liable, can not be made. *Ib.*
7. *Same.—Pleading.—Evidence.*—To establish and foreclose a lien upon a building, for the value of materials used in the construction thereof, the material man must aver and prove that such materials were furnished by him expressly for such building. *Talbott v. Goddard et al.*, 496
8. *Same.*—It is not sufficient in such case, that the material man, in furnishing materials for the construction of several different buildings, on a general account with the contractor, has kept an itemized statement of the different materials used in each of said buildings, as the same were distributed by the direction of the contractor or owner. *Ib.*

MILL-DAM.

See WATERCOURSE, 1, 2, 3, 4.

MONUMENTS.

See REAL ESTATE, ALIENATION OF, 1, 2.

MORTGAGE.

See DECEDENT'S ESTATES, 8; NEW TRIAL, 1; PLEADING, 8; REAL ESTATE, ACTION TO QUIET TITLE, 2, 3, 4, 5, 6, 7, 9; REDEMPTION, 2; TENDER, 2, 3; USURY, 1, 2.

1. *Promissory Note.—Contract.*—To secure an extension of the time of payment of a debt evidenced by a promissory note secured by a mortgage, a purchaser of the mortgaged property executed to the payee of such note another promissory note, payable at a time beyond the maturity, and for the amount of the principal and interest, of the former note, with the agreement that such former note and such mortgage should be deposited at a certain bank, there to remain until the maturity of the latter note; and that upon the payment of the latter note, the payee should deliver up such former note to said purchaser, and cancel such mortgage.
Held, that upon default being made in the payment of such latter note, such payee was entitled to have a judgment upon such former note, against the maker thereof, and to have a judgment of foreclosure of such mortgage, against said purchaser. *Naltner et al. v. Tappey*, 107
2. *Construction.—Condition.—Demand.—Gift.*—By the terms of a mortgage which, itself, was the only evidence of the indebtedness secured by it, the debt was "to be paid by the mortgagor to the mortgagee, when

called upon by said mortgagee. And the mortgagor does not agree to pay the above sum, to no (any) "one else except said mortgagee. And the mortgagor expressly agrees to pay the sum of money above secured, without any relief," etc.

Held, in a suit upon such mortgage, by the administrator of the estate of the deceased mortgagee, that it must be alleged in the complaint, and proved on the trial, that a demand for the payment of the debt secured was made on such mortgagor, during the lifetime of such mortgagee, by him or his agent.

Held, also, that proof of a demand made by such administrator, as such, is not sufficient.

Held, also, that on the death of such mortgagee, without having demanded payment of such debt of such mortgagor, the consideration for such debt became a gift to the latter. *Sebrell et ux. v. Couch, Adm'r*, 122

3. *Indemnity for Future Endorsements*.—The several joint owners of certain property executed a mortgage to another, for the purpose of securing him against any loss that he might thereafter sustain by reason of his theretofore having become, and of his thereafter, to a specified amount, becoming, an endorser of the paper of a certain one of such mortgagors; the mortgagee therein binding himself to make such future endorsements. Afterwards, such mortgagee, with notice that the mortgagor for whom he had endorsed had sold and transferred his interest in the mortgaged property to his co-mortgagors, became endorser for such mortgagor, to the amount specified, whereupon, such first endorsements by such mortgagee having been satisfied, such co-mortgagors brought an action against such mortgagee, to cancel such mortgage.

Held, that the security afforded by such mortgage, to the mortgagee, on the endorsements he had made prior to the execution of such mortgage, was a valid consideration for his agreement to make such future endorsements; and,

Held, that all of such mortgagors must be taken to have had notice of the terms and contents of such mortgage; and, therefore,

Held, that such mortgage is a valid lien upon the mortgaged property, for the amount of all damages sustained by the mortgagee by reason of such endorsements made after such sale, and can not be cancelled until he has been satisfied therefor. *Brinkmeyer v. Browneller et al.*, 487

4. *Same*.—Where such mortgagee has bound himself to make advances or incur liabilities, they, when made, relate back, and such mortgage will be a valid lien therefor, against subsequent purchasers or encumbrancers with either actual or constructive notice of such mortgage. *Ib.*

5. *Same*.—*Optional Advances or Liabilities*.—Where there is no obligation on the part of such mortgagee, and such advances or liabilities are merely optional with him, if he make such advances or incur such liabilities, with notice that the mortgaged property has been purchased or encumbered by another, the latter is not bound by such mortgage. *Ib.*

NEGLIGENCE,

See CITIES AND TOWNS, 4, 5; HIGHWAY, 9, 10; MASTER AND SERVANT, 1, 2; RAILROAD, 3, 4, 10.

NEW TRIAL.

See PRACTICE, 7, 13; SUPREME COURT, 7, 11, 24, 26, 37, 40.

1. *As of Right*.—*Foreclosure*.—An order of the circuit court, setting aside a judgment rendered by it in an action to foreclose a mortgage, on payment of costs, and granting a new trial of such cause, as of right, is void; such new trial not being authorized, in such an action, by section 601, 2 R. S. 1876, p. 252. *Jenkins et al. v. Corwin, Adm'r*, 21
2. *Notice*.—An order of the circuit court, vacating a judgment rendered by it in a cause at a previous term, and granting a new trial thereof,

- made on the application of one party but without notice to the opposite party, is void. *Ib.*
3. *Record*.—An order of a court, vacating a judgment rendered by it in a cause, at a previous term, and granting a new trial thereof, is no part of the original case. *Ib.*
4. *Cause*.—"Misconduct of the prevailing party," "error of law at the trial and excepted to by the defendant," and "misconduct of the jury," are too vague and indefinite to constitute grounds for a motion for a new trial of a cause. *Gregory v. Schoenell*, 101
5. *Evidence Excluded*.—Where the cause relied upon as ground of a motion for a new trial of a cause is the improper exclusion of evidence offered on the trial of such cause, such motion must specify particularly the evidence so excluded. *Watt, Guardian, v. DeHaven*, 128
6. *Master Commissioner*.—Where judgment is rendered in a cause, upon the report of a master commissioner to whom it was referred, material error in such report is ground for a new trial. *Cronkhite v. Johnson*, 175
7. *Verdict*.—Where the jury trying a cause, in the face of uncontradicted evidence, returns a verdict contrary thereto, such verdict should be set aside, and a new trial granted. *Roe v. Cronkhite et al., Adm'rs*, 183
8. *Evidence*.—Where improper evidence is admitted on the trial of a cause, without objection, its admission is not good ground for a new trial. *Holten v. The Board of Comm'rs of Lake Co.*, 194
9. *Cause*.—An erroneous ruling upon a motion made prior to the trial of a cause is not ground for a new trial. *Vauter v. Gilliland et al.*, 278
10. *Interrogatories to Jury*.—That the answers of a jury to interrogatories are inconsistent with their general verdict is not ground for a new trial. *Trillipo v. Lacy*, 287
11. *Evidence Excluded*.—Where the evidence intended to be elicited by a question put to a witness, but excluded on objection, is not made known to the court at the time such objection is made, such exclusion is not sufficient cause for a new trial. *Mitchell v. Chambers*, 289
12. *Surprise*.—Where "surprise" at evidence given upon the trial of a cause is relied upon as ground for a new trial, if the affidavit which must be made in support thereof be met by counter affidavits, the decision of the court upon the question of fact thereby presented will not be reversed by the Supreme Court, on appeal, on the mere weight of such evidence. *Ib.*
13. *Cause*.—Where the cause relied upon in a motion for a new trial is error of law occurring on the former trial, such error must be particularly specified in such motion. *Wilds et al. v. Bogan*, 331
14. *Causes For.—When Filed.—Waiver*.—If, at the term when a motion for a new trial is made, the court, without objection from the party opposing such motion, grant time until the first day of the next term, to file written causes for such motion, such party will be deemed to have waived the statutory requirement that such causes must be filed at the time such motion is made. *Wilson v. Vance, Adm'r's*, 394
15. *Causes Filed too Late*.—Where such extension has been so granted and acquiesced in, the filing of such causes at a day subsequent to the time fixed, to which the opposite party objects, is too late, unless such causes were discovered after the term at which such motion was made. *Ib.*
16. *Statute Construed*.—The word "decision," as used in section 354, (2 R. S. 1876, p. 183) refers to the finding of facts in a cause tried by the court. *Ib.*
17. *Causes.—Time Given to File*.—Where, at the term at which a finding or verdict is rendered, an oral motion for a new trial is made, but, at the

request of the party making such motion and without objection by the opposite party, time is given by the court, until the next term, to file written reasons in support of such motion, it is too late for the opposite party, at such subsequent term, to then object to the filing of such reasons. *McOsker v. Burrell*, 425

18. *Evidence Excluded*.—The evidence intended to be elicited by a question put to a witness but excluded by the court must be plainly stated to the court, at the time such question is asked, to make such exclusion available as cause for a new trial. *Graeter v. Williams*, 461
19. *When to be Asked*.—A motion for a new trial of a cause must be made at the term at which the finding or verdict therein is rendered. *Ricketts v. Dorrel*, 470

NOTICE.

See CITIES AND TOWNS, 12; CONTRACT, 7; COVENANT; DECEDENTS' ESTATES, 8; DEPOSITION, 1, 2, 6; GUARDIAN AND WARD, 1; MECHANIC'S LIEN, 1, 2, 6; MORTGAGE, 3; NEW TRIAL, 2; REAL ESTATE, ACTION TO QUIET TITLE, 2; REDEMPTION, 1; SUPREME COURT, 20; VENDOR AND PURCHASER.

NUNC PRO TUNC ENTRY.

See PRACTICE, 3.

PARTIES.

See CITIES AND TOWNS, 1; COUNTY CLERK, 4; DECEDENTS' ESTATES, 6, 8; HUSBAND AND WIFE, 3; MECHANIC'S LIEN, 5; PRACTICE, 9; REDEMPTION, 1; SHERIFF'S SALE; TOWNSHIP, 2, 3; VENUE, CHANGE OF.

PARTITION.

See PRACTICE, 5, 6, 7.

1. *Action*.—A proceeding for the partition of lands is a "civil action," within the meaning of the term as used in section 34 of the practice act of this State. (2 R. S. 1876, p. 46.) *Kyle et al. v. Kyle*, 387
2. *Judgment*.—A judgment partitioning lands can not be reversed in part and affirmed in part, but the entire judgment must be set aside, if reversed, by the Supreme Court. *Ib.*

PARTNERSHIP.

See PROMISSORY NOTE, 9.

PAYMENT.

See CONTRACT, 1, 2; PROMISSORY NOTE, 9.

Voluntary Payment.—In an action to recover moneys paid by the plaintiff to the defendant, a town, for a license to sell intoxicating liquors, under an invalid penal ordinance of the latter, adopted under a void statute, the complaint averred that such payment was made "for the purpose of avoiding the penalty and forfeiture," etc., "and to save himself from arrest and imprisonment for violating the provisions of said ordinance, as provided for by statute."

Held, that such complaint does not show that such payment was not voluntary, and is therefore bad on demurrer for want of sufficient facts. *The Town of Brazil v. Kress*, 14

PERFORMANCE.

See CONTRACT, 2; LANDLORD AND TENANT, 7; STATUTE OF FRAUDS, 1.

PERSONAL PROPERTY, ACTION TO RECOVER.

See CONTRACT, 3, 4, 5, 6.

PLEADING.

See BANKRUPTCY, 4; CITIES AND TOWNS, 2, 4, 9, 10, 15; CONTRACT, 7, 8, 9; COUNTY COMMISSIONERS, 4, 5, 8, 9; COVENANT; DAMAGES, 1, 2; DECEDENTS' ESTATES, 2, 3, 8; FORMER ADJUDICATION; FRAUD, 3; GUARDIAN AND WARD, 3; HUSBAND AND WIFE, 1, 2, 3; MECHANIC'S LIEN, 2, 3, 6, 7, 8; PAYMENT, 1; PRACTICE, 1, 8, 9, 11, 14; PROMISSORY NOTE, 3, 4, 5, 6, 7, 8, 11, 16, 18; RAILROAD, 3, 4; REAL ESTATE, ACTION TO QUIET TITLE, 4; REAL ESTATE, ACTION TO RECOVER, 1; SLANDER, 1, 3, 4, 5, 6; STATUTE OF LIMITATIONS; SUPREME COURT, 4, 12, 14, 17, 28, 31, 35; TOWNSHIP, 3; WATERCOURSE, 1, 2, 3, 4.

1. *Complaint.—Justice of the Peace.*—In a suit commenced in a court of a justice of the peace, the complaint is sufficient if it state the cause of action in such manner that the defendant is thereby informed of the nature of the plaintiff's claim, and that a judgment thereon will be a bar to another suit for the same cause. *Powell v. DeHart*, 94
2. *Contract.—Construction.*—In construing and giving effect to a written agreement, attached to and constituting the basis of a pleading which alleges the terms of such agreement in detail, the writing, itself, and not such allegations, must be considered. *Naltner et al. v. Tappey*, 107
3. *Can not be Double.*—The same paragraph of a pleading can not set up both a denial and matter of confession and avoidance. It may set up either, but not both. *Kimble v. Christie*, 140
4. *Partial Answer to Whole Complaint.*—An answer which, in legal effect, goes to but a part of the complaint to which it is pleaded, is bad on demurrer, when pleaded to the whole. *Reid et al. v. Huston, Adm'r*, 173
5. *Same Cause in Different Forms.*—The same cause of action may be stated in several different forms, in as many different paragraphs of a pleading, in order to meet every probable phase of the evidence to be given thereunder. *Stearns v. Dubois*, 257
6. *Ejectment.*—If, in an ejectment suit, the real estate in controversy be described in a proper exhibit attached to the complaint as part thereof, that is sufficient. *Burk et al. v. Hill*, 419
7. *Motion in Arrest.—Receiver.*—In an action by an alleged receiver, the complaint averred an indebtedness by the defendant to the plaintiff, and that the plaintiff was the duly appointed receiver of a certain person named, and authorized to sue for and collect the debts of the latter; but there was no averment as to when, or by what if any court, such receivership had been decreed.
Held, on motion in arrest, no demurrer having been filed thereto, that the complaint is sufficient. *Griesel v. Schmal, Receiver*, 475
8. *Railroad.—Mortgage Indemnity.*—The property of a railroad company having been conveyed to a trustee, for the benefit of the holders of a bonded indebtedness of such road, by a trust deed, or mortgage, providing that he should receive the earnings and pay the running expenses of such road, which road, with all its appurtenances having been sold to such bond-holders, to satisfy such indebtedness, was reorganized and run under a new corporate name; whereupon the holder of a judgment which had been obtained against such former company, while under the management of such trustee, for killing stock, brought suit against such company to obtain the amount of such judgment, alleging that such trustee had failed to pay the same, but had paid all the earnings of such road to such bond-holders.
Held, on demurrer, the complaint not alleging what amount, if any, of the earnings of such road had ever been received by such trustee, that it is insufficient. *Nicholson v. The Louisville, N. A. & C. R. W. Co.*, 504
9. *Conversion.—Set-Off.*—To a complaint by the sole devisee of the estate of a testator, against an attorney at law, to recover, in part, for moneys alleged to have been collected by the latter upon choses in action so

devised to the plaintiff, and, in part, for an alleged personal indebtedness of the defendant to the plaintiff, the defendant pleaded, by way of set-off, an alleged indebtedness of the estate of such testator to the defendant, for professional services rendered by him in the settlement thereof, but did not allege, either that such matter of set-off had been filed as a claim against such estate, or that such estate had been finally settled.

Held, on demurrer, that such answer is insufficient.

Tracewell v. Peacock et al., 572

10. *Former Adjudication*.—To a complaint by the surviving partner, against the estate of his deceased former partner, for settlement of specified items of the partnership business, the defendant answered former adjudication, attaching to his answer a transcript of the pleadings, proceedings and judgment in a former action between the same parties, in the common pleas court, and averring that the matters adjudicated in the former action were the same as those alleged in the latter, and had been fully and finally adjudicated by such court.

Held, on demurrer, that such answer is sufficient.

Held, also, that the transcript attached to such answer is not a "written instrument," within the meaning of that term as used in section 78 of the practice act, is no part of such answer, and can not be looked to to determine whether the items set out therein are the same as those specified in the complaint.

Wilson v. Vance, Adm'r, et al., 584

POOR FARM.

See COUNTY COMMISSIONERS, 10.

PRACTICE.

See BILL OF EXCEPTIONS; CONVEYANCE, 3; COSTS, 2, 3; DECEDENTS' ESTATES, 7, 8; DEMURRER TO EVIDENCE; DEPOSITION, 2; EVIDENCE, 9, 10, 13, 14; FORMER ADJUDICATION; HIGHWAYS, 4, 5, 6, 7; INJUNCTION; INTERROGATORY TO JURY; MECHANICS' LIEN, 3, 5, 6; NEW TRIAL, 2, 11, 14, 15, 17, 18, 19; PARTITION, 2; RAILROAD, 7; REAL ESTATE, ACTION TO QUIET TITLE, 7; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 3, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 24, 25, 26, 28, 29, 31, 37, 39, 40, 43, 44; WITNESS.

1. *Pleading*.—It is not error to sustain a demurrer to a paragraph of a pleading, amounting only to an argumentative denial.

Hill et al. v. Gust, by His Next Friend, Gust, 45

2. *Impeaching Question*.—A question asked a witness, for the purpose of laying the ground to impeach him by evidence that he has made statements, out of court, different from testimony he has given as such witness, must clearly state the time when, the place where, and the person to whom the statements in question were made. *Ib.*

3. *Nunc Pro Tunc Entry*.—The office of a *nunc pro tunc* entry is, to cause to be entered of record, at a subsequent term, some action had in a cause, but omitted from the record, at a prior term; not to enter, now for then, something occurring only at the subsequent term.

Wilson v. Vance, Adm'r's, 394

4. *Superior Court*.—*Assignment of Error*.—Where, on appeal from the special to the general term of the superior court, no error is assigned in the latter term, no question is presented to the Supreme Court, on appeal thereto.

Johnson et al. v. Kohl, 454

5. *Partition*.—To question the validity of a partition of lands, made and reported by the commissioners appointed therefor, exception must be taken, not merely to the decree for partition, but to the report of such commissioners.

Kern, Ex'r, et al. v. Maginnis et al., 459

6. *Same*.—If, in an action for the partition of lands, where no motion for

- a new trial is made, a sale thereof is made and reported according to the decree therefor, no question is raised by a mere exception to the report of such sale. *Ib.*
7. *Same.—Verdict.—New Trial.*—Objection to the verdict rendered in such cause must be presented by a motion for a new trial. *Ib.*
 8. *Pleading Rejected.*—The rejection of a special answer alleging matters susceptible of proof under the general denial, also pleaded, is harmless. *The City of Aurora v. Colshire*, 484
 9. *Demurrer.*—A demurrer to a complaint, alleging as cause a defect of parties defendants, should point out whom the additional party defendant should be. *Nicholson v. The Louisville, N. A. & C. R. W. Co.*, 504
 10. *Amendment.*—The court, in its discretion, may allow the filing of additional pleadings, if no objection be made, even after issues have been perfected at a prior term and the cause continued to another, and even after heavy costs have accrued, which would not have accrued had such pleadings been filed at the prior term. *Duncan v. Cravens et al.*, 525
 11. *Same.—Payment of Costs.*—Where such additional pleadings have been so filed, the court has no power to compel the party filing them to pay such costs, so accrued, before requiring issue to be joined on such pleadings. *Ib.*
 12. *Evidence Excluded.—New Trial.*—Where alleged error of the court, in the admission or exclusion of evidence offered, is relied upon as ground for a new trial, such evidence must be clearly specified in the written motion therefor. *Harvey v. Osborn*, 535
 13. *Instructions to Jury.*—Where the law embodied in instructions, asked to be given to the jury trying a cause, is in part contained in instructions given, and in part not applicable to the evidence given in the cause, it is not error to refuse them. *Ib.*
 14. *Demurrer to Answer.—Effect Upon Complaint.*—If an insufficient answer be pleaded to the whole of a complaint consisting of sufficient and insufficient paragraphs, a demurrer to such answer can not be so carried back as to sustain it to the insufficient paragraphs of such complaint. *Tracewell v. Peacock et al.*, 572
 15. *Superior Court.—Supreme Court.*—Error of the superior court, at special term, must be assigned in such court at general term, or it can be considered by the Supreme Court on appeal. *Ib.*
 16. *Same.—Circuit Court.*—An alleged erroneous ruling of the circuit court, made during the pendency therein of a cause afterwards transferred by change of venue to the superior court, must be assigned as error, in the latter court, at general term, or it can not be considered by the Supreme Court. *Wilson v. Vance, Adm'r, et al.*, 584

PRESUMPTION.

See CITIES AND TOWNS, 2, 3, 4; DEPOSITIONS, 2; CRIMINAL LAW, 5; SUPREME COURT, 17, 19; UNITED STATES COURTS, 1,

PRINCIPAL AND AGENT.

See EVIDENCE, 5; REAL ESTATE, ACTION TO QUIET TITLE, 9.

PRINCIPAL AND SURETY.

See BANKRUPTCY, 1; EVIDENCE, 4, 12; FORMER ADJUDICATION; PROMISSORY NOTE, 11, 15; STATUTE OF LIMITATIONS, 2.

1. *Delay in Issuing Execution.—Insolvency.*—Though contrary to the request of the surety, and during its continuance the principal become insolvent, a voluntary delay by a judgment creditor, in issuing execution upon a judgment obtained against such principal and surety, as

such, before a justice of the peace, does not discharge such surety, though the principal remain solvent for a sufficient period after the rendition of such judgment, for the amount thereof to be made by execution.

Hogshead v. Williams et al., 145

2. *Surety May Protect Himself.*—Where, in a suit against a principal and surety, the latter desires to protect himself against a probable future insolvency of the former, he may, at the time judgment therein is rendered, object to granting any stay of execution, or he may pay off said judgment and have execution thereon for his own benefit. *Ib.*

PROCESS.

See CITIES AND TOWNS, 1.

1. *Summons.—Service.—By Whom.*—Service of a summons in a civil action can be made only by the sheriff to whom it is directed, or by his deputy, or, in case of the absence, interest or incapacity of such sheriff, by the proper coroner. *Kyle et al. v. Kyle*, 387
2. *Statute Construed.*—Section 292 of the practice act of this State (2 R. S. 1876, p. 154) provides only as to the mode of making proof of the service of process, and not as to how or by whom such service shall be made. *Ib.*
3. *Same.*—Section 37 of such practice act (2 R. S. 1876, p. 49) refers to the manner, only, of service of summons, and not to the person by whom it may have been made. *Ib.*
4. *Jurisdiction.*—Where service of summons is made by an unauthorized person, no jurisdiction of the person so served is thereby acquired by the court. *Ib.*

PROMISSORY NOTE.

See CONVERSION; LANDLORD AND TENANT, 6; MORTGAGE, 1; TENDER, 1.

1. *Suit by Assignee.—Evidence.*—In a suit against the maker, only, of a promissory note, by one alleging himself to be the owner thereof by a written assignment, such assignment must be given in evidence on the trial of such cause, or the plaintiff can not recover. *Jackson T'w'p v. Barnes et al.*, 136
2. *Payable in Bank.—Fraud.—Innocent Holder.*—Where one, on the false and fraudulent representation of another, and in the honest belief, that it is an instrument of a different character, executes a promissory note to such person, payable in a bank of this State, he is liable for the amount thereof, to an innocent endorsee thereof, for value, before its maturity. *Kimble v. Christie*, 140
3. *Pleading.*—In such action, an answer to the complaint by the maker, verified by affidavit, denying any knowledge on his part of having executed such note, but admitting, that, by the fraud and misrepresentation of the payee, in procuring the signature of the maker to what the latter honestly believed and was informed was an instrument of a different nature, he may have executed such note, is a plea, not of either general or special denial of the execution thereof, but of confession and avoidance, and is bad on demurrer. *Ib.*
4. *Same.*—In such action, if the complaint aver that the payee endorsed the note to the plaintiff before it was due, such averment imports that the plaintiff is a *bona fide* holder thereof for value. *Ib.*
5. *Same.—Former Adjudication.*—Where, to a complaint upon a promissory note, the defendant pleads, by way of counter-claim, that he has been defrauded and damaged by the plaintiff in the execution of a bond given in the course of the same business transaction in which the note in suit was executed, and such matter of counter-claim was set up in

a suit upon such bond, it is *res adjudicata*, and can not be set up against such note. *Reid et al. v. Huston, Adm'r*, 173

6. *Same.—Fraud.—Waiver.*—Fraud in the execution of a written instrument, alleged to have damaged the makers thereof, is waived by the giving of a promissory note, thereafter, in settlement of the same business transaction in which such bond was given, and in a suit upon such note, five years after the execution of such bond, such fraud constitutes no defence. *Ib.*
7. *Same.—Ratification.*—In a suit upon a promissory note, against the maker, by an endorsee, where the answer of the defendant alleges facts showing that the execution of such note was procured by fraud, and without consideration, a reply thereto is sufficient which alleges that after the assignment and the maturity of such note, the defendant verbally agreed with such endorsee, that in consideration that the latter would extend the time of payment thereof for a specified period, he would then pay the same, and that such extension had been given. *Doherty et al. v. Bell*, 205
8. *Variance.—Held*, also, that such reply is not a variance. *Ib.*
9. *Payment.—Set-Off.—Evidence.*—Where, prior to the maturity of a promissory note, executed by the defendant to the plaintiffs, in their copartnership name as a banking firm, one of the plaintiffs withdraws from such copartnership, which is continued by the other partners, in the old firm name, evidence that money was deposited with such firm by, or on behalf of, the defendant, after the maturity of such note, will not support a plea of set-off against, or payment of, such note. *Dawson v. Wilson et al.*, 216
10. *Abatement.*—Where, in a suit against two joint makers of a promissory note, service of process is had upon one, but not upon the other, "abatement of the action" as to the latter does not discontinue such suit. *Ib.*
11. *Acceptance.*—By the acceptance of a draft drawn upon him, the acceptor becomes, not merely a surety for the drawer, but a principal debtor. *Marsh v. Low*, 271
12. *Accommodation Acceptance.*—In a suit upon an acceptance, it is no defence that the acceptor executed the same, without receiving any consideration therefor, merely for the accommodation of the drawer, to whom the acceptor was not then, and has not since been, indebted, and for whom he has never held any funds subject to draft. *Ib.*
13. *Warranty by Drawee to Drawer.*—Where the consideration of a draft, as between the drawee and drawer, was the unconditional, *bona fide* sale of an article of personal property by the former, to the latter, accompanied by a warranty, a breach thereof can not be set up by the acceptor, as a defence to an action against him, upon his acceptance of such draft. *Ib.*
14. *Sale.—Rescission.*—A breach of a warranty of personal property which was unconditionally sold, in the absence of fraud, gives to the purchaser no right to rescind the contract, but an action upon such warranty, either by way of an original action, or by recoupment. *Ib.*
15. *Dates.—Principal and Surety.—Blanks.*—Where a promissory note, perfect in all its parts except that the date is left blank, is signed by the makers as principal and surety, and intrusted by the latter to the former, for delivery to the payee, such principal has an implied authority to fill such blank by inserting therein the true date of its execution, but he has no authority to insert a date prior to the true one; nor has such payee, if he have knowledge of the true date of its execution and of the signing by such surety, as such, a right to accept such note with such false date inserted. *Emmons et al. v. Meeker*, 321

16. *Alteration.—Pleading.*—A verified plea, by a codefendant in an action upon a promissory note, alleging that he had executed the same as surety only, and that since he had signed the same, it had been altered by inserting a false date, prior in point of time to the true one, but not alleging that such alteration had been made since the delivery of said note, nor that it had been done with the knowledge of the payee, is insufficient on demurrer. *Ib.*
17. *Continuance.*—In an action upon a promissory note, where issue was made by one defendant, as surety, by a verified denial of its execution, he asked a continuance of the cause, upon his affidavit, alleging the absence of a witness by whom he could prove, that after he had signed such note, while it was in the possession of his codefendant, the principal, the latter, in the absence of the affiant, but in the presence of the payee, caused a false date, prior to the true one, to be inserted in a blank left for the date, and had then delivered the same to the payee. *Held*, that such facts were material to the issues in the cause, and that a continuance should have been granted. *Ib.*
18. *Action by Assignee Against Maker.—Pleading.*—To the complaint by the assignee, against the makers, of a promissory note not governed by the law merchant, the defendants, "for answer and by way of cross-bill," admitted the execution of such note in the character of principal and surety, but alleged that it was executed to the payee, for a balance due upon a former promissory note held by such payee against such defendant principal only, and merely for convenience in making credits thereon, as no space for that purpose remained upon the former note; that such former note was executed for a balance supposed to be due to such payee upon the dissolution of a business partnership therefore existing between such payee and principal, but, inasmuch as such supposed balance was shown by a statement of such business prepared by such payee only, and without an opportunity by such principal to ascertain its correctness, he had executed it solely at the solicitation of the payee and upon his promise to make a full showing as to such statement and correct any mistakes, omissions or overcharges therein, by reducing the amount of said note; that such payee had failed and refused to make such showing; that he had made overcharges and omissions as to certain matters, specified, in various sums, aggregating more than the amount of the note in suit, and for which the principal was entitled to relief; and such pleading prayed that such payee be made a party to the action, and required to make such showing, and demanded judgment for the excess of such counter-claim over the note in suit. *Held*, on demurrer, that such pleading was intended as a counter-claim against such payee. *Held*, also, that it did not state facts sufficient to constitute either a counter-claim, as against such payee, or an answer, as against the plaintiff. *Held*, also, that such pleading, being intended as a counter-claim against such payee, could not at the same time be an answer against the plaintiff. *Gabe v. McGinnis et al.*, 372

PROSECUTING ATTORNEY.

See DECEDENTS' ESTATES, 5, 6.

RAILROAD.

See PLEADING, 8.

1. *Regulations of.—Passengers on Freight Trains.*—Where due notice thereof is given, and the necessary means for complying therewith are provided, a railroad company has a right to adopt a regulation prohibiting the conductors of its freight trains from carrying passengers thereon, who shall not have previously procured a specified kind of ticket. *Falkner v. The Ohio & M. R. W. Co.*, 369

2. *Ejecting Passengers.*—Where a passenger having notice of and neglecting to comply with such regulation is ejected from such train by the conductor thereof, by the use of no more force than is necessary, he can not maintain an action therefor. *Ib.*
3. *Killing Stock.—Law.—Negligence.—Pleading.*—To be sufficient as an action at common law, the complaint against a railroad company, to recover damages for negligently killing stock, must allege that such injury did not result from the negligence of the plaintiff.
The Jeffersonville, etc., R. R. Co. v. Lyon, 477
4. *Same.—Misjoinder of Actions.*—Where, in such action, the complaint does not show the plaintiff to have been guilty of no contributory negligence, but is sufficient as a complaint under the statute of this State; *Held*, on demurrer for misjoinder of causes of action, that allegations of negligence on the part of the defendant should be treated as surplusage, and the action regarded as statutory. *Ib.*
5. *Same.—Action Under the Statute.*—A complaint is sufficient against such company, to recover damages for killing stock, alleging that such stock, being the property of the plaintiff, had entered upon the defendant's right of way and track, at a point where the same had been carelessly and negligently left unfenced, and, whilst there, was, by the defendant's train of cars, driven into a cut through which such track ran, and there killed. *Ib.*
6. *Same.—Evidence.—Fencing Road.*—In such statutory action, the defendant need not allege, but under the general denial simply, may prove, that the point where such stock entered upon its track was one which could not properly be fenced. *Ib.*
7. *Instructions to Jury.*—On the trial of such statutory action for killing stock, instructions to the jury, applicable only to an action therefor at common law, are erroneous. *Ib.*
8. *Fence.—Cattle-Guard.*—To keep its road "securely fenced," according to the requirements of the statute, a railroad company must construct and keep in repair sufficient cattle-guards, on each side of highways crossing its track. *The Pittsburgh, C. & St. L. R. W. Co. v. Eby, 567*
9. *Same.*—If a cattle-guard be in such condition that stock can pass over it, from a highway, onto the track of a railroad upon which it is situated, such road is not "securely fenced," within the meaning of the statute. *Ib.*
10. *Killing Stock.*—If, by reason of a railroad company's neglect to repair a cattle-guard accidentally put out of repair, of which it has had reasonable notice, stock enter upon its track, over such cattle-guard, from a highway, and are killed, such company is liable therefor. *Ib.*

RATIFICATION.

See CONTRACT, 5, 6; PROMISSORY NOTE, 7.

REAL ESTATE, ACTION FOR RENT.

See LANDLORD AND TENANT, 2, 6; SHERIFF'S SALE.

REAL ESTATE, ACTION TO QUIET TITLE.

1. *Evidence.*—In an action to quiet the title to real estate, the defendant, under the general denial, can give in evidence all defences, either legal or equitable. *Graham v. Graham et al., 23*
2. *Conveyance.—Mortgage.—Vendor and Purchaser.*—Where a deed of conveyance of real estate, though absolute on its face, is executed and intended simply as security for the payment of a debt owing from the grantor to the grantee, it amounts to a mortgage only, and confers no title upon a person who, having notice of such fact, obtains a conveyance of such real estate from such grantee. *Ib.*

3. *Estoppel.—Title Acquired After.*—Where one, who, by a quitclaim deed, has conveyed real estate to which he had then no title, afterwards acquires title thereto, he is not estopped, by such quitclaim, from asserting his after-acquired title to such land. *Ib.*
4. *Mortgage.—Pleading.*—The purchaser of the equity of redemption of real estate which is encumbered by mortgage liens of different priorities, if he be in possession under such purchase, may maintain an action to quiet his title, against the holder of the junior mortgage, without alleging that he has paid off the senior.
Holten v. The Board of Comm'rs of Lake Co., 194
5. *Same.—Equities of Different Liens.*—Where, in such action, such purchaser had made valuable improvements and redeemed such realty from a judicial sale of the same under a decree foreclosing the senior mortgage, any rights which the holder of such junior mortgage may establish are subject to the equities of such purchaser, whether such foreclosure was or was not regular. *Ib.*
6. *Same.—Evidence.*—To establish an equity by such redemption, the plaintiff may introduce the record of a foreclosure of such senior mortgage by means of a power of attorney contained therein, or by a regular foreclosure suit, the sheriff's sale and deed thereunder, and the deed to the plaintiff from the sheriff's grantee. *Ib.*
7. *Same.—Practice.*—Where, in such cause, the evidence shows that such junior mortgage is not a valid lien, the defendant can not complain of the introduction of improper evidence by the plaintiff in establishing his equities under such senior mortgage. *Ib.*
8. *Cities and Towns.—Public Street.—Dedication.*—The owner of certain real estate within the limits of a city laid it out in lots and streets, as an addition to such city, and prepared, and caused to be recorded in the recorder's office of the county wherein it was situated, a plat designating the different lots and streets and their dimensions, and sold and conveyed certain of such lots, fronting upon one of such streets, to persons who made valuable improvements thereon; and such city, after permitting such street to be used for the bed of a canal, upon the abandonment of the same, caused the same to be filled up, improved and used as a public street.
Held, in an action by such owner, against such city, to quiet the title in him to such street, that he had dedicated the same to the use of the public, and can not recover. *Shanklin v. The City of Evansville, 240*
9. *Mortgage.—Assignment.—Principal and Agent.*—A., to procure the loan of money, signed and acknowledged a mortgage on his real estate, securing a promissory note for such sum, also signed by him, and both payable to B., who had promised that upon the execution and delivery of these instruments, he would make such loan to A.; these instruments were delivered to C., who was to present them to B., procure such loan, retain thereof a sum for services yet to be performed by him for A., and pay over to the latter the remainder; C. presented them to B., who declined to accept them or to make such loan to A., but as C. was indebted to B. in a sum equal to the amount to have been retained by C., B. proposed to assign such note to C., grant the latter an extension on his debt, and loan him a sum of money equal to the excess of A.'s note over such debt, if C. would execute to B. a promissory note for the amount of such loan to C., which proposal was accepted by the latter, and executed by both, and C. placed such mortgage on record; subsequent to the signing, but prior to the assignment and recording of such mortgage, A., for a valuable consideration, conveyed such realty by a quitclaim deed, to D., against whom C. brought suit to foreclose such mortgage.
Held, that no legal delivery of such note and mortgage had been made to

B., that his assignment thereof to C. was ineffectual, and that D. was entitled to a decree quieting his title against such mortgage.

Goodwin v. Owen et al., 243

REAL ESTATE, ACTION TO RECOVER.

See CONTRACT, 9; HUSBAND AND WIFE, 5; PLEADING, 6.

1. *Pleading.—Insanity of Grantor.*—Under the issue, formed by a general denial of the allegations of a complaint in the ordinary statutory form, to recover real estate, where the plaintiff has proved himself to be the legal heir of a deceased former owner of such realty, who died intestate, and the defendant has introduced in evidence and claims title under a deed from such ancestor, it is competent for the plaintiff then to introduce evidence that such ancestor, at the time of the execution of such deed, was a person of unsound mind. *Freed et al. v. Brown et al.*, 310
2. *Evidence.*—To establish that the grantor was a person of unsound mind, at the time of the execution by him of a conveyance of his real estate, it is not necessary to show that, at that time, he had been so found, in a proceeding for that purpose, and was then under guardianship. *Ib.*
3. *Conveyance.*—The conveyance of a person of unsound mind, made before he has been so found in a proceeding therefor, is voidable merely. *Ib.*

REAL ESTATE, ALIENATION OF.

See CONVEYANCE.

1. *Conveyance.—Monuments.—Measurements.*—A. owned a quarter section of land, across which, running north and south, at a distance of less than twenty-five rods from the west line thereof, a highway was located. He conveyed to B. a portion of such land, by a deed describing the portion conveyed as the whole quarter section "less a strip, twenty-five rods in width, off the east side of said premises; and, also, less a strip, twenty-five rods in width, off the west side of said described quarter section, containing one hundred acres, be the same more or less; expressly reserving a right of way from the east side of said premises, across said premises, to the highway on the west side of said premises."
- Held*, that, though thereby including a portion of the strip reserved on the west side of said quarter section, yet such highway constitutes the western boundary line of the portion conveyed. *Simonton v. Thompson*, 87
2. *Same*—Where a tract of land, conveyed by deed, is therein described in one way by measurements, and in another and different way by monuments, the latter description must control. *Ib.*

RECEIVER.

See PLEADING, 7.

REDEMPTION.

See SHERIFF'S SALE.

1. *Contract For.—Forfeiture.—Vendor and Purchaser.—Notice.—Demand.—Parties.—Tender.—Amendment.*—On the trial of an action in the circuit court, by C. against E., to set aside certain conveyances of real estate, and allow the plaintiff to redeem the same, the findings of the facts were, that A. and B. held certain, separate judgments against C., the plaintiff, the aggregate amount of which was equal to about one-eighth of the value of the real estate in controversy, upon which they were liens; that such realty was sold, at a sheriff's sale, to B., upon an execution on his, the junior, judgment, for a sum equal to the amount of his judgment and costs, and a certificate of such purchase issued to

B.; that subsequently C., taking a mortgage thereon back to himself to secure an unpaid balance of the purchase-money, sold and conveyed such land, by warranty deed, to D., and put him in possession, which he still retains; that, on the last day for the redemption of such real estate, B. assigned such certificate of purchase to A., the holder of such senior judgment, to whom C. then paid, as part of the redemption money for such realty, a certain sum of money, with the agreement that if C. paid to A. the remainder of such redemption money, and, also, the amount of such senior judgment, by a time fixed beyond the expiration of the time for redemption, A. would surrender such certificate and all claims on such land to C., but that, on failure by C. to make such payment, he should thereby forfeit his right to redeem and also such sum already paid, to A.; that within such time, so agreed upon, A. procured a deed to himself, for such realty, from the proper sheriff, and, C. having failed to make such payment within the time fixed, A. refused to surrender such certificate or to give C. further time; that A. subsequently entered into a written contract with E., to convey such realty, by quitclaim, to the latter, upon his paying to A. a sum equal to the amount of such judgments and costs; and that E., after the making of his contract with A., having received notice from C., that the latter had a contract with A., concerning such realty, though not of its nature, paid to A. the sum so agreed upon and received such conveyance.

Held, that C. retained sufficient interest in the subject-matter of the cause to bring such action.

Held, also, that the payment of such part of the redemption money to A., by C., and the making of such contract to redeem, waived the right of the former to a deed from the sheriff, and rendered such certificate merely a security in his hands for the payment of the remainder of such redemption money.

Held, also, that such clause of forfeiture for non-payment is unconscionable and should not be enforced; time not being of the essence of such contract.

Held, also, that the notice to E. of C.'s contract with A. was sufficient to bind E., and that C. is entitled to a judgment enabling C. to redeem such land on payment of such unpaid redemption money.

Held, also, that a tender of such unpaid redemption money and a demand by C. for a reconveyance of such land, before bringing suit, was not necessary.

Held, also, that though, on the trial of such cause, all the evidence was heard at one term, but no finding or judgment rendered, and the cause continued until the next term of such court, there was no error in permitting the plaintiff then, before the argument of the cause, to amend his complaint, so as to therein offer to pay to the defendant whatever sum the court might find due to him to enable the plaintiff to redeem.

Spath v. Hankins, 155

2. *Rights Between Judgment and Mortgage Creditors.*—Where real estate, encumbered by a mortgage prior in lien to that of a mere personal judgment against the owner thereof, is first sold by the sheriff upon an execution issued on such judgment, and afterwards upon a decree of foreclosure of such mortgage, rendered in a proceeding therefor, whereof the purchaser had no notice, and without redeeming from him, he or his grantee may, either in an original action by him, to redeem, against the latter purchaser, or by a counter-claim in an action by the latter against him to quiet title, have an accounting of the amount actually due to such latter purchaser, and obtain a decree allowing him to redeem by paying such amount so found to be due.

Coombs v. Carr et al., 303

3. *Tender.*—To redeem in such action it is not necessary, that prior to the commencement thereof, such junior claimant shall have tendered

the amount due to the holder of the prior claim, nor need he bring such amount into court; it being sufficient to offer, in his pleading, to pay whatever amount shall be found due. *Ib.*

REFORMATION OF WRITING.

See CONTRACT, 9.

REMITTITUR.

See COSTS, 2, 3; SUPREME COURT, 43.

REPEAL OF STATUTES.

See APPEAL; ATTORNEY GENERAL; CRIMINAL LAW, 2; LIQUOR LAW, 6; TURNPIKE, 1, 2.

REPLEVIN.

See CONTRACT, 3, 4, 5, 6.

1. *Fence.—Fixture.*—Fence rails and stakes, though unlawfully taken and detained by a wrong-doer, when used by him in the construction of a fence upon his real estate, thereby become part of such realty, and can not be replevied by the owner, as personal property. *Ricketts v. Dorrel*, 470
2. *Same.*—When an article is made personal property, by being severed, by a wrong-doer, from the realty to which it first belonged, it may be replevied, by the owner, as long as its separate identity can be ascertained; but not after it has been united to and forms part of any realty. *Ib.*
3. *Statute Construed.—Action.—Real.—Personal.*—The legislature of this State did not, by the enactment of the code abolishing the distinctions between actions at law and suits in equity, and between the forms of such actions and suits, thereby abolish the distinction existing between real and personal actions, so as to allow rights in, or injuries to, real property to be determined in an action for replevin. *Ib.*

RESCISSION.

See CONTRACT, 3, 4, 5, 9; COUNTY COMMISSIONERS, 5; PROMISSORY NOTE, 14.

SALE.

See CONTRACT, 3, 4, 5, 6, 7; PROMISSORY NOTE, 14; STATUTE OF FRAUDS, 3.

SET-OFF.

See PLEADING, 9; PROMISSORY NOTE, 9; SUPREME COURT, 18.

SHERIFF.

See BANKRUPTCY, 3; FIXTURE, 4.

SHERIFF'S SALE.

See HUSBAND AND WIFE, 5; LANDLORD AND TENANT, 2; REDEMPTION; SPECIFIC PERFORMANCE.

Real Estate.—Action for Rent.—Where, by virtue of a decree of court, against one defendant in an action, his real estate is sold to satisfy a judgment against a codefendant for the payment of a sum of money, and, the same remaining unredeemed for the year immediately following such sale, it is conveyed by the proper officer to the purchaser at such sale, the latter, and not the former, defendant is liable to such purchaser, for the rent thereof for such year. *Powell v. DeHart*, 94

Held, also, that evidence of the statements of A., that he had made such title-bond because of the loss of such certificate, is immaterial.

Butler et al. v. Holtzman et al., 125

STATUTES, CONSTRUCTION OF.

See CITIES AND TOWNS, 1, 9, 11, 12, 13, 15; COUNTY COMMISSIONERS, 1, 2, 12; COVENANT; CRIMINAL LAW, 2; DECEDENTS' ESTATES, 6; DESCENTS, 2; GUARDIAN AND WARD, 6, 7; INSANITY; LIQUOR LAW, 6; MECHANIC'S LIEN, 1, 2; NEW TRIAL, 1, 16; PROCESS, 2, 3; REPLEVIN, 3; SUPREME COURT, 1; TENDER, 3.

STATUTE OF FRAUDS.

1. *Verbal Agreement to Convey.—Performance.*—A., the owner of certain real estate, in order to procure means to purchase certain other real estate of B., would be compelled to dispose of his own real estate, which could only be done at a certain sacrifice, of which he informed B. B. verbally agreed with A., that if the latter would so dispose of his property and apply the proceeds of such sale to purchasing B.'s real estate, he, B., on a certain day, for a fixed price, would sell and convey his real estate to A. The latter thereupon disposed of his real estate, making such sacrifice, tendered to B. the proceeds of such sale, demanded of him that he so convey his said real estate to A., and, upon B.'s refusal to so sell and convey, brought an action for damages for a breach of such agreement.

Held, on demurrer for want of sufficient facts, that such agreement to convey is within the statute of frauds.

Held, also, that A.'s disposal of his property, at such sacrifice, was not such a part performance as would take B.'s agreement out of the operation of such statute.

Parker v. Heaton, 1

2. *Verbal Promise.—Satisfaction of Execution.*—A verbal promise by one person, to the creditor of an execution on a judgment against a third person, that if such creditor will satisfy such execution, such promisor will deliver certain personal property and pay a certain sum of money to such creditor, is not within the statute of frauds, but is a valid contract, for a breach of which an action may be maintained and damages recovered by such creditor, upon his satisfying such execution.

Palmer v. Blain, 11

3. *Sale.—Instruction to Jury.*—At a public sale, by the plaintiff, of his personal property, a portion thereof was bid off by a person who, being unable to give security for the purchase price, could not obtain possession thereof; whereupon the defendant verbally agreed that he would see that the plaintiff got his pay, if he would deliver such property to the bidder, to which the plaintiff acceded and made such delivery to the bidder.

Held, that such agreement is void by the statute of frauds.

Held, also, that an instruction to the jury trying such cause, that such agreement made the defendant liable for such price, was erroneous.

Held, also, that the test, as to whether the defendant in such case is liable, is, whether any credit *whatever* was given to the person receiving the property, and if there was, then the defendant is not liable.

Pettit v. Braden, 201

STATUTE OF LIMITATIONS.

See COUNTY CLERK, 3; COVENANT.

1. *Exceptions of.—Pleading.*—The assignee, by parol, of a judgment instituted an action against the administrator of the estate of his deceased judgment debtor, and a third person, to set aside an alleged fraudulent conveyance to the latter, of a tract of land, by such decedent in his

lifetime, and to subject the same to execution to satisfy such judgment, alleging, also, that such estate was insolvent.

Held, on demurrer, that such action may be brought within six years from the accruing of such cause of action.

Held, also, that where a statute of limitations contains exceptions, if the complaint in an action does not show, affirmatively, that it is not within any of such exceptions, it is not defective on demurrer, under such statute.

Held, also, that a default made by such defendant administrator admitted the alleged assignment of such judgment without further proof.

Held, also, that on the trial of such action, it was competent to introduce in evidence the inventory of such estate, and the tax duplicate of such county, as touching the solvency or insolvency of such estate.

Cravens et al. v. Duncan, 347

2. *Contribution.—Fraudulent Conveyance.*—A joint judgment having been rendered against two sureties of an insolvent principal upon an official bond, and a purchaser from one of them of realty subject to the lien of such judgment, having paid it off to discharge such lien, brought an action against a purchaser of other realty, prior to the rendition of such judgment, from such other surety, to set aside such conveyance and subject such realty to contribution to such judgment, alleging such conveyance to have been made, and received with intent to defraud such other surety's creditors. The defendant having pleaded the statute of limitations of six years,—

Held, on demurrer, that such answer is sufficient.

Duncan v. Cravens et al., 525

SUMMONS.

See CITIES AND TOWNS, 1; DECEDENTS' ESTATES, 8; PROCEES.

SUPERIOR COURT.

See PRACTICE, 4, 15; SUPREME COURT, 44.

SUPERVISOR.

See HIGHWAY, 8, 9, 10.

SUPREME COURT.

See BILL OF EXCEPTIONS; CONTINUANCE, 2, 3; COSTS, 2, 3; DAMAGES, 1; DECEDENTS' ESTATES, 7; INTERROGATORY TO JURY, 1; JUDGMENT; LIQUOR LAW, 6; NEW TRIAL, 12; PARTITION, 2; PRACTICE, 4, 5, 15, 16; SPECIAL FINDING.

1. *Appeal.*—Section 20 of "An act providing for voluntary assignments," etc., approved March 5th, 1859, 1 R. S. 1876, p. 142, does not, of itself, authorize the taking of an appeal to the Supreme Court.

Cravens, Assignee, v. Chambers et al., 5

2. *Judgment.*—The action of the circuit court in refusing to allow or approve a report, by the assignee of the property of an insolvent debtor, of the condition of his trust, is not a final judgment, nor an interlocutory order, from which an appeal will lie to the Supreme Court. *Id.*

3. *Misjoinder.*—Error, in overruling a demurrer to a paragraph of a pleading, for a misjoinder therein of several causes of action, is not available on appeal to the Supreme Court. *Ball et ux. v. Nash*, 9

4. *Sufficiency of Complaint.*—The sufficiency of the complaint in an action may be questioned, for the first time, in the Supreme Court, on appeal thereto, by assigning as error its insufficiency.

The Town of Brasil v. Kress, 14

5. *Appeal.—When.*—An appeal to the Supreme Court, from a judgment rendered in the lower court, in a civil action, must be taken within three years, not from the decision of a motion to set aside an order

- granting a new trial of the cause, but from the rendition of such judgment.
Jenkins et al. v. Corwin, Adm'r, 21
6. *Weight of Evidence*.—On appeal, the Supreme Court will not disturb the verdict of a jury upon the mere weight of evidence.
Hill et al. v. Gust, by his next friend, Gust, 45
 7. *Assignment of Error*.—An assignment as error, on appeal to the Supreme Court, of matter which is only cause for a new trial, presents no question for decision.
Gregory v. Schoenell, 101
 8. *Weight of Evidence*.—The Supreme Court, on appeal, will not disturb the finding of the lower court, on the mere weight of the evidence, even where the preponderance thereof seems to be against the finding.
Watt, Guardian, v. De Haven, 128
 9. *Appeal*.—The refusal of the circuit court, in term time, or of a judge, in vacation, to grant a temporary restraining order during the pendency of a suit for a perpetual injunction, is not an interlocutory judgment or order from which an appeal lies to the Supreme Court.
Ogle et al. v. Dill et al., 130
 10. *Practice*.—Where the evidence given on the trial of a cause is not in the record, the overruling of a demurrer to an insufficient paragraph of a pleading is available as error, on appeal to the Supreme Court, even though a remaining paragraph of such pleading is sufficient.
Kimble v. Christie, 140
 11. *Bill of Exceptions*.—Where no question is raised upon the pleadings in a cause, if the bill of exceptions be not filed within the time prescribed by the court trying such cause, it forms no part of the record, and no question is presented to the Supreme Court, on appeal thereto.
Hiatt v. Powell, 149
 12. *Harmless Error*.—The sustaining of a demurrer to a paragraph of a pleading is not available as error, on appeal to the Supreme Court, where all the facts therein alleged were admissible and admitted, on the trial of the cause, under a remaining paragraph of such pleading.
Spath v. Hankins, 155
 13. *Improper Evidence*.—Where the court trying a cause, over the objection and exception of a party thereto, permits an improper question to be put and answered by a witness testifying therein, yet, if on appeal to the Supreme Court, the record does not show what the answer was, such ruling is not available as error.
Brookbank v. The State, ex rel. Murphy, 169
 14. *Waiver*.—Where a party to a suit goes into trial without requiring the opposite party to answer or reply to his own pleading, he can not avail himself of such failure, on appeal to the Supreme Court.
Holten v. The Board of Comm'rs of Lake County, 194
 15. *Pleading*.—Where the evidence is not in the record, on appeal to the Supreme Court, the sustaining of a demurrer to a sufficient paragraph of a pleading is available as error.
Doherty et al. v. Bell, 205
 16. *Same*.—Where no exception is reserved to the action of the circuit court in sustaining a demurrer to a pleading, no question in relation to such ruling can be presented to the Supreme Court, on appeal.
Graham v. Kennedy, 209
 17. *Presumption*.—Where, from the record on appeal to the Supreme Court, it does not appear that the party complaining of a ruling has been injured thereby, such ruling will be presumed to have been right.
Crawford et al. v. Crockett et al., 220
 18. *Appeal*.—Where in an action commenced in the court of a justice of the peace, and appealed to the circuit court, to recover for a sum less than ten dollars, the defendant files a set-off for an amount exceeding

- that sum, an appeal lies to the Supreme Court from a judgment rendered therein. *Hutts v. Williams*, 237
19. *Costs*.—Where the fees of witnesses subpoenaed, but not used, by the successful party, are taxed to the losing party as costs, on appeal to the Supreme Court it will be presumed, where the evidence is not in the record, that they were rightly taxed. *Ib.*
 20. *Appeal*.—*Notice*.—Where an appeal to the Supreme Court is taken by one of several defendants, without notice thereof to the others, it will be dismissed. *Reeder et al. v. Maranda et al.*, 239
 21. *Bill of Exceptions*.—Where, from the record on appeal to the Supreme Court, it is apparent that all the evidence given on the trial of the cause is not contained in the bill of exceptions, the verdict or finding below will not be disturbed on a question as to the sufficiency of the evidence to sustain it. *Noon et al. v. Lanahan et al.*, 262
 22. *Weight of Evidence*.—The verdict of a jury will not be disturbed on appeal to the Supreme Court, on the mere weight of evidence. *Ib.*
 23. *Assignment of Error*.—The assignment of errors, on appeal to the Supreme Court, must contain the full names of all the parties to the appeal, or it will be dismissed. *Darnall et al. v. Hurt, Guardian*, 275
 24. *Bill of Exceptions*.—Where no bill of exceptions is in the record on appeal, and no special finding of facts was made by the court, the Supreme Court can not review the action of the circuit court upon a motion for a new trial, based upon the ground that the finding of such court was contrary to law or unsustained by the evidence. *Hottell v. Adamson et al.*, 276
 25. *Assignment of Error*.—Where, on such appeal, the rulings of the circuit court, complained of in the assignment of errors, do not appear in the record, no question is presented for decision. *Ib.*
 26. *New Trial*.—Where the truth of the grounds of a motion for a new trial is not made manifest by the record on appeal, no question as to the ruling on such motion is presented to the Supreme Court. *Vawter v. Gilliland et al.*, 278
 27. *Weight of Evidence*.—Where the evidence given on the trial of a cause tends to support the finding therein, the Supreme Court, on appeal, will not disturb such finding on the mere weight of evidence. *Mitchell v. Chambers*, 289
 28. *Harmless Error*.—Error, in sustaining a demurrer to a good paragraph of a pleading, is not available on appeal to the Supreme Court, if the matters therein alleged could have been given in evidence under a remaining paragraph. *Emmons et al. v. Meeker*, 321
 29. *Bill of Exceptions*.—Where time beyond the term is not given by the court to file a bill of exceptions, it forms no part of the record on appeal to the Supreme Court. *Long et al. v. Dixon et al.*, 352
 30. *Weight of Evidence*.—The Supreme Court, on appeal, will not disturb the finding or verdict below, upon the mere weight of evidence. *Whitehall v. Conner*, 354
 31. *Motion to Strike Out*.—Error in overruling a motion to strike out part of a pleading is not available as error on appeal to the Supreme Court. *Moore, Adm'r, v. The State, ex rel. Denny, Att'y Gen'l*, 360
 32. *Waiver*.—The failure of a party to an appeal to the Supreme Court, to refer in his brief to a question raised by his assignment of error, is deemed a waiver thereof. *Burk et al. v. Hill*, 419
 33. *Waiver*.—The failure of a party, on appeal to the Supreme Court, to discuss, in his argument, a question made in the record, is deemed a waiver thereof. *The Indianapolis, P. & C. R. W. Co. v. Crane et al.*, 430

34. *Weight of Evidence*.—The Supreme Court, on appeal, will not reverse a judgment on the mere weight of evidence. *Ib.*
35. *Assignment of Error*.—To present, for the consideration of the Supreme Court, on appeal, the action of the court below upon a demurrer to an answer, it must be assigned as error. *Graeter v. Williams*, 461
36. *Waiver*.—The failure of a party, in his argument on appeal to the Supreme Court, to notice a question, presented by his assignment of errors, is deemed a waiver thereof. *Ib.*
37. *Instruction to Jury*.—Where alleged error, in instructions given to the jury, is relied upon as ground for obtaining a reversal of a cause in the Supreme Court, a mere reference in the argument to the fact that such instructions were given, excepted to and embodied in a motion for a new trial, is insufficient, as the grounds of objection to each of them must be clearly pointed out. *Ib.*
38. *Petition for Rehearing*.—It is too late, upon petition for a rehearing of a cause, then to present, for the first time, a question for the consideration of the Supreme Court. *Ib.*
39. *Bill of Exceptions*.—A statement of fact, alleged as cause in a motion for a new trial, must be shown by a bill of exceptions to be true, or alleged error, based thereon, will not be considered by the Supreme Court. *Ib.*
40. *Bill of Exceptions*.—Questions arising upon the motion for a new trial of a cause can not be presented to the Supreme Court, by a bill of exceptions filed, without leave of court, beyond the term at which such motion was acted upon. *Griesel v. Schmal, Receiver*, 475
41. *General and Special Finding*.—Where, from the evidence given on the trial of a cause, wherein a general finding has been rendered, the Supreme Court would not disturb a special finding, supporting such general finding had it been made, upon a particular point urged against the latter, such point will not be considered.
The Ohio, etc., R. W. Co. v. Vickery et al., 509
42. *Waiver*.—A failure by a party appealing to the Supreme Court to discuss, in his argument therein, an error assigned by him, is deemed a waiver thereof. *Tracewell v. Peacock et al.*, 572
43. *Remittitur*.—A remittitur below of the excess of damages there recovered so cures the finding or verdict that an assignment, as error, of the overruling of a motion for a new trial, based upon alleged excessive damages, is not available on appeal to the Supreme Court. *Ib.*
44. *Appeal—Superior Court*.—An appeal to the Supreme Court, from the superior court, lies only from judgments or orders of the latter court rendered at general term. *Wilson v. Vance, Adm'r, et al.*, 584
45. *Petition for Rehearing*.—Where the decision of a cause may be placed upon proper grounds, and is right, a mere erroneous reason therefor, assigned in the opinion, is not sufficient ground for a rehearing. *Ib.*

TAXES.

See CITIES AND TOWNS, 14, 17.

Assessment of—Removal of Taxpayer.—The fact that a person, who was the owner of personal property, had been assessed thereon, on the first day of April, for taxation for State and county purposes, will not prevent his being assessed upon the same property for city purposes, upon his removing into a city of the county where he had been so assessed, prior to the first day of June following, carrying such property with him.
Hilgenberg v. Wilson, Treasurer, 210

TENDER.

See GUARDIAN AND WARD, 2; HIGHWAY, 11; REDEMPTION, 1, 3; USURY, 1.

1. *Conditional.—Promissory Note.*—A tender of the amount due upon a promissory note payable in a bank of this State, made upon the condition that such note shall be surrendered, is sufficient.
Storey et al. v. Kewson et al., 397
2. *Debt Secured by Mortgage.*—A tender of the amount due upon a promissory note secured by a mortgage on real estate, made upon the condition that such mortgage shall be released or cancelled, is insufficient.
Ib.
3. *Same.*—Section 5 of "An act concerning mortgages," approved May 4th, 1852, (2 R. S. 1876, p. 333) requires a mortgagee of lands to enter satisfaction thereof only upon his having received, not a tender merely, but full payment of the debt secured thereby.
Ib.

TITLE-BOND.

See SPECIFIC PERFORMANCE.

TOWNSHIP.

1. *Power to Contract.*—A civil township has no power to make a contract for the benefit of school property. *Jackson T'w'p v. Barnes et al.*, 136
2. *Parties.*—A suit against a township, in its name as a civil township, upon a contract made by the trustee of such township as "township trustee," for school furniture, is a suit against the civil township, and can not be maintained.
Ib.
3. *Same.—Pleading.*—In a suit against such township, in its name as a civil township, an allegation that it is "a corporation for the purposes of common schools" does not render such action one against the school township, but is a mere *descriptio personæ*.
Ib.

TRESPASS.

See BANKRUPTCY, 3.

TURNPIKE.

1. *Gravel Road.—Lien.*—By the enactment of the act of March 18th, 1875, (Acts 1875, Reg. Sess., p. 80) repealing the act of May 14th, 1860, (3 Ind. Stat., p. 538) authorizing the making and collection of assessments on lands, to aid in the construction of plank, macadamized and gravel roads, not only the remedy for enforcing the collection, but also the lien, of assessments made for such purposes, under the latter act, is taken away. *Webb v. The Brandywine Junction Turnpike Co. et al.*, 441
2. *Assessors.*—The act of March 11th, 1867, (Acts 1867, Reg. Sess., p. 167) authorizing the assessment of lands, to aid in the construction of gravel roads, was repealed by the act of May 14th, 1869, (3 Ind. Stat., p. 538) in relation to the same subject, and, therefore, assessors appointed under the former act could not, after the enactment of the latter, without a reappointment, make either a valid assessment, or a correction of a former but defective one made by them.
Ib.
3. *Number of Assessors.*—Neither the act of March 11th, 1867, nor that of May 14th, 1869, in relation to such assessments, authorized the making of any such assessment, in any one proceeding, by more than three assessors, and therefore any such assessment, made by more than three assessors, was void.
Ib.
4. *Amending Report of Assessment.*—Where, under such latter act, in making an assessment for the construction of a gravel road, a portion of the lands subject thereto were omitted, the original assessors only, and not partially or entirely different ones, could, under the order of the proper county board, complete such assessment.
Ib.

UNITED STATES COURTS.

See BANKRUPTCY.

Judgments of.—How Attacked Collaterally.—Where a judgment rendered by a district court of the United States, not showing upon its face a lack of jurisdiction of such court over the parties to or subject-matter of the cause so adjudicated, comes in question collaterally, in an action in a court of this State, it will be presumed, until the contrary is affirmatively shown by plea, that such district court had had such jurisdiction.

Hays v. Ford et al., 52

USER.

See WATERCOURSE, 1, 2, 3, 4.

USURY.

1. **Interest.—Tender.—Costs.**—During the operation of the act of May 27th, 1852, fixing the lawful rate of interest at six per cent. and allowing usurious interest to be recouped, and of the 51st section of the act of June 14th, 1852, declaring the bargaining for a greater rate of interest than that allowed by law to be a misdemeanor, a person executed a promissory note which included, as part of its principal, a usurious amount for interest, and also a mortgage upon real estate to secure it; during the operation of the act of December 19th, 1865, providing that where usurious interest had been voluntarily paid it could not be recouped, the maker voluntarily paid such usurious interest to the payee; and, during the present law of this State upon such subject, approved March 9th, 1867, providing for the recoupment of usurious interest, such maker instituted suit to cancel such note and mortgage, and seeking to recoup such usurious interest, so paid by him.

Held, that the latter act governs as to the remedy in such action, and that such usurious sum can be recouped.

Held, also, that upon a tender by the maker, to the payee, of the amount of the real principal of such note, with ten per cent. interest thereon, demanding the surrender of such note, and the release of such mortgage, prior to the bringing of such action, and the bringing of such tender into court, the maker is entitled to a decree satisfying such obligations, and to a judgment for costs. *Bowen v. Phillips, Adm'r, et al.*, 226

2. **Mortgage.**—The purchaser of real estate, with covenants of warranty and against incumbrances, in an action against him to foreclose a mortgage thereon, given by his grantor to secure a promissory note, can not avail himself, as matter of defence, of the fact that the debt for which such note was given was usurious.

Studabaker et al., Ex'rs, v. Marquardt et al., 341

3. **Defence.—To Whom Available.**—That a contract is usurious is a defence which is personal to the debtor, and is available only to himself, his creditors, representatives, heirs, or some one by him authorized. *Ib.*
4. **Same.**—In this State usurious contracts are not void, but only voidable as to the part which is usurious. *Ib.*

VARIANCE.

See HIGHWAY, 2; PROMISSORY NOTE, 8.

VENDOR AND PURCHASER.

See MORTGAGE, 3, 4, 5; PLEADING, 8; REAL ESTATE, ACTION TO QUIET TITLE, 2, 3, 4, 5, 6, 7; REDEMPTION, 1; USURY, 2.

Vendor's Lien.—Innocent Purchaser.—A. conveyed certain land to B, receiving for an unpaid part of the purchase-money the promissory note of the latter; B. in like manner conveyed such land to C., receiving his promissory note for an unpaid amount of the purchase-money, equal to that due from B. to A.; B. having, for a valuable consideration,

transferred C.'s note to D., the latter, while still having an opportunity of returning such note to B., if subject to any defence, called upon C., who informed him that his note was valid and would be paid; and B. having become insolvent, A., whilst both such notes remained unpaid, brought suit against B., C. and D., to enforce a lien against such land, for his unpaid purchase-money, of which C. and D. had had no notice, prior to the transfer of C.'s note to D.

Held, that A. is not entitled to such lien. *Woody v. Fialar et al.*, 592

VENIRE DE NOVO.

See INTERROGATORY TO JURY, 4.

VENUE.

See SLANDER, 5.

VENUE, CHANGE OF.

Bastardy.—A change of the venue of a prosecution for bastardy, from the county where it is pending for trial, can not be granted on an application and affidavit therefor, by and on behalf of the relatrix, she not being a party to such action. *The State, ex rel. Mabbitt, v. Smith*, 385

VERDICT.

See CONTRACT, 9; INTERROGATORY TO JURY; NEW TRIAL, 7, 10; PRACTICE, 7; SPECIAL FINDING.

WABASH AND ERIE CANAL.

See CITIES AND TOWNS, 4.

WAIVER.

See JUDGMENT, 1; NEW TRIAL, 14, 17; PROMISSORY NOTE, 6, 7; SUPREME COURT, 14, 32, 33, 36, 42.

WARRANTY.

See CONVEYANCE, 1; PROMISSORY NOTE, 13, 14.

Measure of Damages.—*Instruction to Jury*.—Where, in an action to recover the contract price of a chattel, the defence is a counter-claim for damages for a breach of a warranty of soundness of such chattel, alleged to have been made by the plaintiff on the sale thereof, the court instructed the jury trying the case that the measure of damages to be allowed for such breach was the difference between such contract price and the actual value of such chattel at the time of sale, to which might be added necessary expenses in finding and caring for such chattel during its unfitness for use caused by the unsoundness complained of.

Held, that such instruction is erroneous throughout. *Trillipo v. Lacy*, 287

WASTE.

See DECEDENTS' ESTATES, 8.

1. *Injunction*.—*Growing Timber*.—Where the tenant of an estate for life takes timber growing thereon, for the purpose of replacing an improvement thereon which has been destroyed by the act of God, he is liable to the reversioner in an action for waste, and may be enjoined from its continuance. *Miller v. Shields et al.*, 71
2. *Same*.—Where the tenant of an estate for life, out of the profits thereof, has replaced an improvement thereon, which has been destroyed by the act of God, he has no right to reimburse himself for such outlay, by selling or bartering the timber growing thereon; and if he so disposes of such timber he thereby commits waste. *Id.*

3. *Same.*—The tenant of an estate for life has a right to take, of the timber growing thereon, sufficient to make all necessary repairs which he, as such tenant, is bound to make; but, unless it is clearly the most economical mode of making such repairs, he has no right to exchange it for lumber with which to make such repairs. *Ib.*
4. *Same.—Defence.*—That the tenant of an estate for life, at his own expense, has made valuable improvements thereon, which he was not bound to make, is no ground of defence or recoupment in an action against him, by the reversioner, for waste in selling the timber growing thereon. *Ib.*

WATERCOURSE.

See HIGHWAY, 8, 9.

1. *Injunction.—Mill-Dam.*—That the defendant and his grantors, for the preceding fifty years, adversely and under a claim of ownership, had continuously enjoyed and used the right to flow the water in a stream running through the lands of both, back upon the lands of the plaintiff, by means of a mill-dam across such stream, used during such period, is a sufficient answer to a complaint to enjoin the defendant, on the ground that such dam will not be of public utility and will be injurious to the plaintiff, from repairing or rebuilding it. *Ogle et al. v. Dill et al., 130*
2. *License.*—That such use was enjoyed for such period, by the defendant and his grantors, by virtue of a license from the grantors of the plaintiff, and that upon the faith thereof defendant and his grantors had expended large sums of money in erecting such dam, is also a sufficient answer to the complaint in such cause. *Ib.*
3. *Insolvency.*—Where, for the reason alleged in such complaint, that owing to the insolvency of the defendant, an action at law for damages for the erection of such dam would be an inadequate remedy, a temporary restraining order against the defendant is granted, an answer of such use and license renders such allegation of insolvency immaterial, and it need not be denied in such answer. *Ib.*
4. *Temporary Restraining Order.*—Where, upon such complaint's being verified by the plaintiff, a temporary order, restraining the defendant from proceeding to rebuild such dam, is granted by the court, on the filing of an answer alleging such adverse possession, use and license, verified by the defendant, and by others who profess to know the facts, but are not parties to the action, an order of such court, during the pendency of such cause, dissolving such temporary restraining order, is not error. *Ib.*

WEIGHT OF EVIDENCE.

See SUPREME COURT, 6, 8, 22, 27, 30, 34.

WILL.

See DECEDENTS' ESTATES, 8.

1. *Construction of.*—Where, by the terms of his will, the testator devised his real estate, subject to certain charges thereon, to his widow, during her lifetime, and directed that at her death it should be sold by his executor, and the proceeds thereof divided in certain proportions, amongst certain of his children, such widow, on accepting such provisions, became the tenant for life of such estate, and such children became the reversioners of such estate. *Miller v. Shields et al., 71*
2. *Charitable Uses.—Devise to County.*—A testator devised "to the commissioners of" a certain county, "and to their successors in office forever, * * * in trust and for the use and benefit of the orphan poor, and for other destitute persons of said county," all his real estate therein; and also, in like manner, for the support and education of such persons and for the improvement of such real estate, all his "other prop-

erty of every description ;" directing that the latter be converted into money, by executors named, and, after the payment of debts, etc., the residue to be paid over to such devisee ; and also directing that such real estate should never be sold, but be retained forever as a home for such persons. In an action instituted by the heirs of the testator, to set aside such will and obtain an order on such executors to pay to the plaintiff the proceeds of such " other property,"—

Held, that such devise is valid.

Held, also, that such county has the legal capacity to take and execute such trust.

Held, also, that such devise is sufficiently certain as to its beneficiaries.

The Board of Comm'rs of Lagrange County et al. v. Rogers et al., 297

3. *Court of Chancery.—Statute of Elizabeth.*—A court of chancery has power, independently of the statute of 43 Elizabeth, to cause a devise for charitable uses to be upheld and executed. *Ib.*

4. *Law of Place.*—Though the last will of an executor may have been executed and attested in another State, yet, if he die while domiciled in this State, the law of the latter must be applied by her courts in determining whether such will has been duly executed.

Patterson et al. v. Ransom, 402

5. *Attesting.—Intention of Testator.—Parol Evidence of.*—The execution of his last will by the testator, having been attested by but one witness, such testator afterwards, at a different place, and in the absence of such witness, executed an endorsement upon the back of such will, reading, "The within is the basis on which I desire to have my affairs disposed of, should no other will be made by me," which endorsement was attested by another witness, to whom its contents had been made known, and the signature to such will exhibited, by such testator.

Held, in an action to contest the validity and resist the probate of such will, that it had not been executed according to law and is invalid.

Held, also, that it can not be established by parol evidence that the signature of such witness, to such endorsement, was intended by the testator, and executed by such witness, as an attesting of such will.

WITNESS.

See CONTINUANCE, 1 ; SUPREME COURT, 19.

1. *Credibility.*—The weight to be given to the evidence of different witnesses testifying in a cause, is a question to be determined solely by the jury trying it. *Nelson v. Vorce*, 455

2. *Same.*—Whether or not interest in the result of the cause on trial, or relationship to a party to such cause, affects the credibility of a witness testifying therein is a question solely for the jury trying it. *Ib.*

3. *Same.—Party.—Relationship.—Instruction to Jury.*—It is error for the court to charge the jury trying a cause, in relation to the credibility of witnesses, that "The evidence of parties to the action, and of those related to them, as their sons and daughters, is not entitled to as much weight as the evidence of disinterested witnesses." *Ib.*

END OF VOLUME LV.

